No. 93-1823-CFX
Status: GRANTED

Docketed:
May 16, 1994

Title: Missouri, et al., Petitioners
v.
Kalima Jenkins, et al.
and
Missouri, et al., Petitioners
v.
Kalima Jenkins, et al.

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Munich,John R.

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Rule 12.2. Missouri, et al. v. Kalima Jenkins, et al. 93-3274, Dec: 12-08-93 Reh: 02-24-94.

Entry	Date	Note	Proceedings and Orders
1	May 16 1994	G	Petition for writ of certiorari filed.
3	Jun 3 1994		Order extending time to file response to petition until July 5, 1994.
6	Jul 1 1994		Brief of respondents Kansas City, Missouri School District, et al. in opposition filed.
4	Jul 5 1994		Brief of respondents Kalima Jenkins, et al. in opposition filed.
5	Jul 6 1994		DISTRIBUTED. September 26, 1994 (Page 34)
7	Aug 10 1994	X	Reply brief of petitioners filed.
8	Sep 26 1994		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 8, 1994. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 6, 1994. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 20, 1994. Rule 29.2 does not apply.
			**********
14	Nov 7 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Eighth Circuit.
10	Nov 8 1994		Joint appendix filed.
11	Nov 8 1994		*Joint appendix in 3 volumes
12	Nov 8 1994		Brief of petitioners State of Missouri, et al. filed.
13	Nov 8 1994		Brief amici curiae of Icelean Clark, et al. filed.
15	Nov 14 1994		SET FOR ARGUMENT WEDNESDAY, JANUARY 11, 1995.(1ST CASE).
16	Nov 18 1994		CIRCULATED.
17	Nov 23 1994	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Dec 5 1994		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.

No. 93-1823-CFX

Entry	Date	Note	Proceedings and Orders
20	Dec 5 1994	X	Brief amicus curiae of Lawyers Committee for Civil Rights Under Law filed.
26	Dec 5 1994	X	Brief amicus curiae of United States filed.
19	Dec 6 1994	X	Brief amici curiae of National Urban League, et al. filed.
21	Dec 6 1994	X	Brief amici curiae of James D. Anderson, et al. filed.
22	Dec 6 1994	X	Brief amicus curiae of Civic Council of Greater Kansas City filed.
23	Dec 6 1994	X	Brief amici curiae of American Civil Liberties Union, et al. filed.
24	Dec 6 1994	X	Brief of respondents Kansas City, Missouri School District, et al. filed.
25	Dec 6 1994	X	Brief of respondents Kalima Jenkins, et al. filed.
27	Dec 20 1994	X	Reply brief of petitioners filed.
28	Dec 28 1994		Record filed.
		*	Original record proceedings United States District Court for the Western District of Missouri (12 BOXES)
29	Jan 11 1995		ARGUED.

Supreme Court, U.S.
FILED

93 1 823 MAY 16 1994

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

The questions presented in this petition arise from the continuing, long-running litigation over the remedial phase of the Kansas City, Missouri intradistrict school desegregation case, in which comprehensive and unprecedented educational, financial and physical resources have been provided, thus far at a cost in excess of $1.3 billion, to approximately 37,000 students — resulting in the creation of a system recently found by the District Court to offer "facilities and opportunities not available anywhere else in the country."

The questions presented are:

1. Whether a remedial educational desegregation program providing greater educational opportunities to victims of past de jure segregation than provided anywhere else in the country nonetheless fails to satisfy the Fourteenth Amendment (thus precluding a finding of partial unitary status) solely because student achievement in the District, as measured by results on standardized test scores, has not risen to some unspecified level?

2. Whether a federal court order granting salary increases to virtually every employee of a school district — including non-instructional personnel — as a part of a school desegregation remedy conflicts with applicable decisions of this court which require that remedial components must directly address and relate to the constitutional violation and be tailored to cure the condition that offends the Constitution?

PARTIES TO THE PROCEEDING

A complete list of the parties to the proceeding is contained in the caption to the December 8, 1993 opinion of the Court of Appeals. Petition Appendix (hereinafter "Pet. App.") A-28 through A-29. The petitioners are the State of Missouri and its listed officials.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The November 29, 1993, opinion of the Court of Appeals is reported at 11 F.3d 755 and is reprinted at pages 1 to 27 of the accompanying appendix to this petition. The December 8, 1993, opinion of the Court of Appeals is reported at 13 F.3d 1170 and is reprinted at pages 28 to 35 of the appendix. The order of February 24, 1994, denying panel rehearing has not been reported. It is reprinted at pages 36 to 42 of the appendix. The order of March 15, 1994, denying the suggestion for rehearing en banc, along with the concurring opinion and the dissenting opinion joined by five of the ten active judges, has not been reported. It is reprinted at pages 43 to 68 of the appendix.

The District Court's orders of June 17, 1992, June 25, 1992, June 30, 1993, and July 30, 1993, have not been reported. They are reprinted at pages 69 to 121 of the appendix. Additionally, the District Court's order of April 16, 1993, to which significant reference is made by the Court of Appeals, is reprinted at pages 122 to 143 of the appendix.

JURISDICTIONAL STATEMENT

The judgments of the Court of Appeals were entered on November 29 and December 8, 1993. The order denying the petition for panel rehearing was entered on February 24, 1994. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, § 1: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition, arising out of the seventeen-year old Kansas City, Missouri school desegregation case, presents the Court with the opportunity to provide necessary guidance and clarification to the many lower courts supervising post-liability phase desegregation remedies. It squarely presents the issue of whether "success" in desegregation is measured by the degree to which equal opportunity has been provided, or whether equal outcomes are required. The Eighth Circuit set an outcome-based standard mandating increased student achievement, as measured by results on standardized test scores, as a prerequisite to a finding that the KCMSD is providing an equal educational opportunity and has eliminated the vestiges of prior de jure segregation. The Eighth Circuit also overstepped its authority in approving desegregation-funded salary increases for virtually all employees — including all non-instructional personnel — of the defendant school district. The jurisdiction of the District Court was based on 28 U.S.C. §§ 1331 and 1343(a)(3).

1. The Prior Proceedings

In 1977, the Kansas City, Missouri School District ("KCMSD" or the "District") and certain KCMSD students filed their initial complaint charging that various named defendants, including the State of Missouri and its Board of Education and various officials, had caused unconstitutional interdistrict segregation throughout the Kansas City metropolitan area. After the District Court realigned the KCMSD as a defendant, *School District of Kansas City, Missouri v. State of Missouri*, 460 F. Supp. 421, 442 (W.D. Mo. 1978),[1] students in the KCMSD and in several other surrounding Missouri districts filed an amended complaint, adding claims of an intradistrict violation within the KCMSD.

The District Court rejected the claims for interdistrict relief, *Jenkins v. Missouri*, Order of June 5, 1984, *aff'd*, *Jenkins v. Missouri*, 807 F.2d 657, 671 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987), but found the KCMSD and State defendants liable on the intradistrict claims. The Court dismissed the federal Department of Housing and Urban Development and the suburban school districts.[2]

In 1985, as part of the remedial phase of this long-ranging litigation, the District Court began implementing an extensive array of quality education programs which have become known

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[1] Although a nominal defendant, the KCMSD, the recipient of the extraordinary funds provided by the State, has sided with the Plaintiffs in virtually every dispute throughout this protracted litigation. As Justice Kennedy noted, "[t]he Plaintiffs and KCMSD might well be seen as parties that have 'joined forces apparently for the purpose of extracting funds from the State treasury.'" *Missouri v. Jenkins*, 495 U.S. 33, 76 (Kennedy, J., concurring), *quoting Milliken v. Bradley*, 433 U.S. 267, 293 (1977) (*Milliken II*) (Powell, J., concurring in judgment).

[2] This case has been before this Court previously on two occasions. *Missouri v. Jenkins*, 495 U.S. 33 (1990) (court-imposed tax increase); *Missouri v. Jenkins*, 491 U.S. 274 (1989) (attorneys' fees).

as the *Milliken II* components. *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985). These included programs providing all KCMSD students with a vast array of additional educational opportunities, including additional educational materials, reduced class sizes, full day kindergarten, extended day programs and other general educational improvement programs. *See generally id* at 26-46. In a typical year, such programs alone cost approximately $54 million. Pet. App. A-143.

Subsequently, the District Court approved the joint request of the defendant KCMSD and Plaintiffs and directed implementation of a further comprehensive plan magnetizing all high and middle schools, and most elementary schools in the KCMSD. These included a performing arts middle and high school, a technical school offering vast and varied programs, a school with a large farm and wildlife area, and a $32 million dual-theme high school for computer and Classical Greek style education, including an indoor running track, gymnastics room and an Olympic-sized swimming pool and natatorium. To date, the magnet programs have cost $301 million, and magnet transportation has cost an additional $118 million. At the same time, the District Court approved a massive capital improvements program which has greatly enhanced the KCMSD physical plant. See *Missouri v. Jenkins*, 495 U.S. 33, 77, 80 (1990) (Kennedy, J., concurring) (outlining the contours of the "extraordinary remedy" ordered by the District Court); *Jenkins v. Missouri*, 931 F. 2d 470, 481 (8th Cir. 1991); *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988). By 1989, $260 million in capital improvements had been ordered. *Jenkins*, 495 U.S. at 61. Currently, expenditures for capital improvements alone total approximately $417 million, with more requests forthcoming. The District Court unsurprisingly found these expensive and wide-ranging remedies "provide[d] the KCMSD with facilities and opportunities not available anywhere else in the country." Pet. App. A-115.

As one part of the remedy, the District Court has provided salary assistance to the KCMSD teachers since 1987. In 1992 the District Court vastly expanded the scope of salary relief to include salary increases to all non-instructional personnel, as well as teachers. This expansion of the remedy added $13.7 million annually to the salary component of the remedy. Currently, all but three of the approximately 5,000 KCMSD employees receive salary increases from court-ordered desegregation funds.

In 1990 this Court — by a 5 to 4 vote — affirmed a method by which the KCMSD could increase taxes above those approved by the voters to pay its share of the extraordinarily costly remedy in KCMSD. *Missouri v. Jenkins*, 495 U.S. 33 (1990).[3] In his concurring opinion, Justice Kennedy, joined by the Chief Justice, and Justices O'Connor and Scalia, expressed serious concerns over the "extraordinary" scope of this remedy. Justice Kennedy noted that the remedy was unprecedented in its breadth and cost, to an extent "never before . . . approved" by the Court. He also questioned the need for numerous remedial components, the exclusion of which could have made the taxing mechanism affirmed by this Court unnecessary. 495 U.S. at 76-80 (Kennedy, J., concurring). The additional requirements of increased test scores and salary increases for virtually all KCMSD employees, which the Eighth Circuit imposed below, have since further increased the already "extraordinary" scope of this remedy.

To date, the wide-ranging remedies ordered by the District Court in this case have cost local and State taxpayers more than $1.3 billion. The State so far has paid approximately $838

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[3] The District Court had imposed a tax increase on KCMSD patrons directly. *Id.* at 41. The Eighth Circuit, while allowing the District Court's increase to stand, had modified the procedures to be used such that the Board would approve a levy. The District Court would then enjoin interference with the levy increase. *Id.* at 43. This Court rejected the District Court's approach, but affirmed the modified procedure. *Id.* at 58.

million in support of its share of the costs and some of the KCMSD's share through application of joint and several liability. The total cost for the *Milliken II* and salary increase components at issue here through February, 1994 is more than $300 million and $143 million, respectively. In addition to the massive desegregation payment KCMSD has received since fiscal year 1986, over the same time frame it has also received $471 million in regularly appropriated State funding for education. In the 1992 fiscal year, combining its regular and court-ordered desegregation expenditures, KCMSD spent the highest amount per pupil of any district in the State of Missouri, $13,500, fully $3,000 more per student than the next highest district. KCMSD, a constitutional violator, has expressed no interest in obtaining a return of local control, apparently intoxicated by the extraordinary funds it receives from the State Treasury. *See Milliken II*, 433 U.S. at 293 (Powell, J., concurring in judgment).

2. The Litigation Leading Up to the Court of Appeals' Opinions

Early in the remedial phase of this litigation, the District Court set forth its standard for the remedy:

> The long term goal of this Court's remedial orders is to make available to all KCMSD students *educational opportunities* equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district.

Jenkins, 639 F. Supp. at 54 (emphasis added). The District Court stated its rationale for providing these educational opportunities:

> In achieving this goal, the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct . . .

Id. In this Court's 1990 decision in this case, the four concurring Justices questioned the Constitutional necessity of the District

Court's "suburban comparability" standard. *Jenkins*, 495 U.S. at 76 ("It cannot be contended that interdistrict comparability, which was the ultimate goal of the District Court's orders, is itself a constitutional command.")

Following this Court's 1992 decision in *Freeman v. Pitts*, __ U.S. __, 112 S. Ct. 1430 (1992), the State sought partial unitary status with regard to the *Milliken II* programs. It premised its request on the undisputed fact that these programs had met, and in most cases vastly exceeded, the questionable standard set by the District Court for these programs in its 1986 remedial order. With regard to "suburban comparability," the State presented undisputed evidence that the programs in place in the KCMSD had exceeded opportunities available in *all* the suburban school districts in almost every area. Despite this uncontroverted evidence, and the District Court's later finding that suburban comparability standards had been vastly surpassed, Pet. App. A-115, the District Court rejected the State's partial unitary status arguments, instead ordering additional budgets for the programs. It wholly failed, however, to analyze the *Freeman* issues or render any findings whatsoever on those questions. Pet. App. A-69.

On appeal, a panel of the Eighth Circuit affirmed the District Court's order, and in the opinion imposed for the first time in the case an entirely new standard--surpassing even the questionable "suburban comparability" benchmark--for determining whether unitary status has been reached. The Court imposed the requirement that the State prove an unspecified level of improvement in student achievement, in place of the traditional measure of equal educational opportunity. Pet. App. A-21. While acknowledging that the decisions of this Court in *Board of Education v. Dowell*, 498 U.S. 237 (1991) and *Freeman* established the nature of the inquiry necessary in considering the question of partial unitary status, the panel went dramatically further, stating:

> The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation.

Pet. App. A-21.[4]

The result of the Eighth Circuit's decision is the creation of an unprecedented student performance-based test for analyzing the sufficiency of the quality education component of a remedy. The five judges dissenting from the denial of the State's petition for en banc rehearing recognized that the Eighth Circuit's new standard supplanted the traditional equal opportunity benchmark that has long guided Fourteenth Amendment jurisprudence.

In the same decision in which it injected the new student achievement standard, the Eighth Circuit panel also upheld the District Court's order granting across-the-board desegregation-funded salary increases to virtually all KCMSD employees. Such funding of District-wide salary increases first became an issue in the case in 1990, when the Plaintiffs, the KCMSD and an intervenor, American Federation of Teachers, Local 691

[4] That these statements contemplated an increase in test scores as a standard for a declaration of partial or full unitary status is clear, as those were the only measures of student achievement the District Court had addressed. Prior to the panel ruling, the District Court had stated, in dictum, that while the KCMSD magnet schools had increased educational opportunities and attracted some suburban non-minorities to the KCMSD, the KCMSD could not be declared partially unitary "because the District is still at or below national norms at many grade levels." Pet. App. A-131. The testimony of KCMSD witnesses at the hearing in May, 1992, which led to the District Court's June 17, 1992, order discussed test scores extensively, as the five judges dissenting from denial of en banc rehearing noted. Pet. App. A-62. Those judges concluded "the panel felt that student achievement, or lack thereof, was the watermark up to which the tide of desegregation effort must flow." *Id.* As noted, *infra* p. 10, the three judges concurring with the denial of rehearing en banc explicitly acknowledged the test results standard the panel had adopted.

("AFT") — the collective bargaining agent for KCMSD teachers — filed motions seeking court-ordered salary increases for both instructional and other non-instructional personnel. The District Court approved a settlement of the initial expanded salary requests, reserving the parties' right to raise subsequently any and all legal objections in its order of July 23, 1990.

The salary issue recurred in 1992 and 1993, when the AFT and KCMSD filed motions seeking additional across-the-board salary funding. The State opposed the motions arguing they requested relief beyond the scope of the remedy and unrelated to the constitutional violation, but the District Court approved desegregation funding for the increases. Order of June 25, 1992, Pet. App. A-76. These court-ordered salary increases covered not only teachers and administrators, but extended to non-instructional employees such as cooks, custodians, carpenters, laborers, electricians, parking lot attendants, security guards, secretaries, clerical workers, business administrators and data processing personnel. On appeal to the Eighth Circuit, the State reiterated its argument (again unsuccessfully) that the salary increases exceeded the District Court's authority because they were not tied to the constitutional violation under *Milliken II*, 433 U.S. at 281-82. The Court of Appeals affirmed the 1992 salary order in its November 29, 1993, opinion, Pet. App. A-1, and the 1993 order in the separate opinion of December 8, 1993. Pet. App. A-28.

Following the Eighth Circuit panel's ruling on these two issues, the State petitioned for rehearing of the Eighth Circuit panel opinions of November 29 and December 8, 1993, and also suggested rehearing en banc. The panel, modifying its initial decision only slightly, denied rehearing on February 24, 1994. Pet. App. A-36.

The full Court of Appeals — split 6 to 5 — denied rehearing en banc on March 15, 1994. Three judges, including Senior

Circuit Judge John Gibson, Judge McMillian (both of whom sat on the panel) and Judge Magill, joined a concurring opinion, while the five dissenting judges joined in an eighteen page opinion authored by Judge Beam.[5] The concurring judges made clear that, in their view, students' standardized test results were a factor in relieving a school district of court supervision:

> When we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered.

Pet. App. A-48.

The dissenting judges, however, consisting of five of the ten members in regular active service on the Court of Appeals, expressed a sharply contrary view, writing:

> The District Court has, with the approbation of the panel, embedded a student achievement goal measured by annual standardized tests into its test of whether the KCMSD has built a high quality educational system sufficient to remedy past discrimination. The Constitution requires no such standard.

Pet. App. A-58. The dissent agreed with the State Defendants that the lack of improvement in standardized test scores was the only factor the District Court had found lacking in the parties' implementation of the desegregation remedy:

> The only factor the District Court saw standing in the way of unitary status for the educational program was continued below average academic performance. Indeed, there is no other evidence in the record to support a conclusion that the

[5] The additional dissenters joining in the opinion were Judges Bowman, Wollman, Loken and Morris Arnold.

> educational enhancement (*Milliken II*) program of the KCMSD is wanting.

Pet. App. A-61.

The five dissenting judges also agreed with the State that salary increases for non-instructional personnel were beyond the scope of a legitimate remedy under *Milliken II*, stating that

> logic does not directly relate the pay of parking lot attendants, trash haulers and food handlers, for instance, to any facet or phase of the desegregation plan or to the constitutional violations.

Pet. App. A-57.

It is against this background of an unprecedented remedy, massive expenditures, and a sharply divided Court of Appeals that this long-running case comes once again to this Court.

REASONS FOR GRANTING THE WRIT

This petition presents two important constitutional issues arising in a desegregation case of "exceptional importance" and involving an array of in-place remedial programs "concededly without parallel in any other school district in the country." *Jenkins*, 855 F.2d at 1318-19 (Bowman, J., dissenting from denial of rehearing en banc). As Justice Kennedy, (joined by the Chief Justice and Justices O'Connor and Scalia) correctly observed in *Missouri v. Jenkins*, the result of the District Court's orders is an "extraordinary remedy" of a breadth "never before . . . approved" by the Supreme Court. 495 U.S. at 80. The remedy has since expanded.

This lawsuit has persisted for over 17 years, and the quality education component, initiated in 1985, has been fully in place since 1989. The case involves an "unparalleled educational experiment that has funneled more than $1.2 billion" into the Kansas City schools to eradicate the vestiges of past *de jure* segregation.[6] The issues at stake here will direct not only the future course and cost of the remedy in Kansas City, but will affect remedy-phase desegregation cases in metropolitan areas throughout the land.[7] For the reasons set out herein, the Court should grant the writ of certiorari and resolve these important issues.

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[6] A. Morantz, *Money, Choice and Equity: Major Investments With Modest Returns* 1 (Harvard Graduate School of Education 1994).

[7] *See, e.g., Brown v. Board of Educ. of Topeka, Shawnee County, Kan.*, 978 F.2d 585 (10th Cir. 1992); *Freeman* (DeKalb County, Georgia); *Diaz v. San Jose Unified School District*, 861 F.2d 591, 593 (9th Cir. 1988); *Tasby v. Black Coalition to Maximize Education*, 771 F.2d 849 (5th Cir. 1985) (Dallas); *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir. 1984) (St. Louis); *United States v. City of Yonkers*, 833 F. Supp. 214 (S.D. N.Y. 1993); *Flax v. Potts*, 725 F. Supp. 322, 325-26 (N.D. Tex. 1989), *aff'd*, 915 F.2d 155 (5th Cir. 1990) (Fort Worth); *Reed v. Rhodes*, 455 F. Supp. 569, 597-602 (N.D. Ohio 1978) (Cleveland). Indeed, in the St. Louis, Missouri desegregation case, where local and state taxpayers have already spent over $1.6 billion, the District Court recently adopted, *sua sponte*, the Eighth Circuit's test requiring

(Footnote 7 continued on next page)

1. The Court of Appeals' Opinion Conflicts With Decisions of This Court Setting Forth the Standards and Limits of Desegregation Remedies. It Also Raises an Important Question of Federal Law That Has Not Been, But Should Be Directly Resolved by This Court — Whether, in Applying the *Freeman* Test for Unitary Status, a Court of Appeals Overseeing a School Desegregation Case May Require Increased Standardized Test Scores.

A. The Court of Appeals' Imposition of a Student Outcome-Based Standard for Unitary Status, Requiring Enhanced Student Achievement, Purports to Guarantee Outcomes Rather Than Opportunities and is Therefore Flatly at Odds With Settled Equal Protection Jurisprudence.

The Eighth Circuit's novel ruling would measure the constitutional sufficiency of a quality education component of a comprehensive desegregation remedy by the degree of improved student achievement, as measured by results on standardized test scores. This outcome-based standard, wholly foreign to traditional equal protection analysis, creates an entirely new and untenable standard for determining when a desegregation remedy has achieved its purpose to the extent practicable. Indeed, the Eighth Circuit's ruling eviscerates this Court's standard announced previously in *Dowell* and *Freeman* precisely because it interposes a requirement that is not "practicable." *Dowell*, 498 U.S. at 250; *Freeman*, 112 S. Ct. at 1446.

(Footnote 7 continued)

improved student achievement for unitariness. *Liddell v. Board of Education*, No. 72-100C(6), Order No. G (1156) 94 at 1-2 (E.D. Mo. May 2, 1994). Moreover, the addition of such a requirement as a prerequisite to a declaration of unitary status may cause renewed efforts to reopen cases in which the remedies did not contain such programs. *See Jenkins*, 495 U.S. at 78 (Kennedy, J., concurring).

Neither this Court nor any other federal appellate court has ever adopted the benchmark of enhanced student achievement as a prerequisite to either full or partial unitary status. In fact, as noted by the five Eighth Circuit judges dissenting from the denial of rehearing *en banc*, this Court long ago rejected the notion that there is a constitutional right to analogous relief, in the context of racial balance in the form of any particular degree of numerical racial mixing. In *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 24 (1971), this Court stated:

> If we were to read the holding of the district court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

Id. See also Pet. App. A-63. Indeed, the Court's unwillingness in *Swann* in 1971 to set outcomes as a test for racial balancing necessarily dooms the Eighth Circuit's student outcome-based standard for educational achievement since it is integration, in the first place, that is the *raison d'etre* of desegregation remedies. *See Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

In the courts below, no party disputed the State's showing that it had complied with the District Court's orders requiring massive funding of over $300 million for implementation of the quality education component of the remedy. Likewise, no party contested the State's showing that the overall quality of education programs the KCMSD offered was equal to or better than analogous programs offered in any surrounding Missouri suburban school district. The comprehensive remedy has provided the KCMSD with numerous quality education programs, magnet schools (every high school, every middle school and more than two-thirds of the elementary schools) providing varied themes and options for all KCMSD students to choose from, and substantial capital improvements, including numerous new buildings, widespread general renovation and the addition of specialized facilities for magnet programs. *See generally* Pet. App. A-

53 - A-55; *Jenkins*, 855 F.2d 1295 (8th Cir. 1988). The remedy is unprecedented in scope and cost. *Jenkins*, 495 U.S. at 76-77 (Kennedy, J., concurring). Indeed, as the District Court itself found, "KCMSD [has been given] facilities and opportunities not available anywhere else in the country." Pet. App. A-115.

The result of these Herculean efforts is unparalleled quality education programs for all KCMSD students, regardless of race. Indeed the District Court found that the KCMSD educational opportunities were unsurpassed by any school district, whether located in suburban Kansas City, McLean, Virginia, or anywhere else. In providing these extraordinary opportunities, the State has more than fulfilled its obligation to remedy the vestiges of "a system-wide reduction in student achievement," *Jenkins*, 639 F. Supp. at 24. Against this background, the Eighth Circuit's attempt to raise the bar yet another notch is flatly inconsistent with the principles of *Swann* and should not be permitted to stand.

Other equal protection decisions of this Court fully support the principle that federal courts may not require, as a prerequisite to unitary status, that a school district guarantee to its students that they attain some arbitrary level of achievement. Just as "[i]t cannot be contended that interdistrict comparability, which was the ultimate goal of the District Court's orders, is itself a constitutional command," so too the Eighth Circuit's creation of a guaranteed outcome standard is clearly outside the Equal Protection Clause's mandates. *Missouri v. Jenkins*, 495 U.S. at 76 (Kennedy, J., concurring). Indeed, the District Court's initial "suburban comparability" standard concerned itself only with facilities and programs — factors at least within government's power to control. A student performance standard, largely beyond the effective control of the State or KCMSD, far exceeds even that questionable benchmark. *See* pp.19-23 *infra*.

Simply because education is at issue here does not dictate deviation from the Court's traditional equal protection analysis.

This Court has repeatedly held that education *per se* is not a fundamental right. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988); *Papasan v. Allain*, 478 U.S. 265, 284 (1986); *Plyler v. Doe*, 457 U.S. 202, 223 (1982); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 35 (1973). The Constitution simply does not contain any guarantee of an education of any particular quality or of any particular level of achievement by the students, individually or collectively. In *Rodriguez* this Court plainly distinguished between protection of rights and supposed guarantees of those rights to particular levels:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's right to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.

Id. at 36 (emphasis in original).[8] Nothing in the decisions of this

[8] *Rodriguez* properly questioned how a right to a particular quality of education could even be effectuated based on the substantial debate regarding "the extent to which there is a demonstrable correlation between educational expenditures and the quality of education." *Id.* at 43 (footnote omitted); *see also id.* at 46 n.101 (questioning whether funding higher teacher salaries and lowering pupil-to-teacher ratios leads to higher educational quality). This legitimate inquiry is illustrated by the experience in the KCMSD. The Morantz study, concerning the Kansas City school desegregation plan, *supra*, pg. 12, n.6 concluded that "the many millions spent have yielded little conclusive evidence that achievement has improved to any more than a modest degree." *Id.* at 1. However, the District Court was not satisfied with these results because it impermissibly concluded that the scores of KCMSD students had to rise to the level of national norms before unitary status could be granted. In light of the numerous factors external to the school environs affecting student performance, *see infra*, at 19-23, it is simply not "practicable" to impose such a student achievement benchmark. *Freeman*, 112 S.Ct. at 1446.

Court supports a guarantee in the school desegregation context of student achievement at any particular level.[9]

In other contexts this Court has likewise never interpreted the Fourteenth Amendment to require equal outcomes; indeed it has rejected that flawed approach. The Court has long defined an equal protection injury as the denial of equal opportunity resulting from the imposition of an unconstitutional barrier, *see, e.g.*, *Turner v. Fouche*, 396 U.S. 346, 362 (1970), not the ultimate inability to obtain the benefit. *Id.* (Plaintiffs had the right to be *considered* for the board of education without the burden of invidiously discriminatory disqualifications, but had no right to be *appointed* to the board). The Court has continuously referred to this standard in determining, for standing purposes, whether a plaintiff has suffered an actionable injury under the Equal Protection Clause. *See, e.g.*, *Clements v. Fashing*, 457 U.S. 957, 962 (1982); *Regents of University of California v. Bakke*, 438 U.S. 265, 281, n.14 (1978).

[9] As one district court correctly noted:

> The 14th Amendment requires an equal education. There is no constitutional guarantee of a quality education. The Constitution is satisfied if all of the students . . . [in a school district] receive an equally bad education, regardless of race.

Coalition to Save Our Children v. Board of Education, 757 F. Supp. 328, 350 (D. Del. 1991). In Kansas City, of course, "KCMSD students have in place a system that offers more educational opportunity than anywhere in America." Pet. App. A-65.

Similarly, the California Supreme Court has stated:

> [T]he primary objective of a desegregation plan is to achieve a *uniformity of educational opportunities* for all races by eliminating the detrimental effects of a segregated school system . . .

McKinny v. Oxnard Union High School District Board of Trustees, 642 P.2d 460, 463 (Cal. 1982). It is not to require test score increases or guarantee equality of results.

Most recently, the Court applied the equal protection injury analysis in *Northeastern Florida Contractors v. Jacksonville*, __ U.S. __, 113 S. Ct. 2297 (1993), in which an association of general contractors challenged a city ordinance according preferential treatment to minority-owned businesses in awarding city contracts. *Id.* at 2299. The Court determined that because the association was denied the opportunity to bid on certain contracts, they had suffered an injury cognizable under the Equal Protection Clause. *Id.* at 2304.

In reaching this conclusion, the *Jacksonville* Court specifically analyzed its 1975 decision in *Warth v. Seldin*, 422 U.S. 490 (1975), where the Court determined that a construction association had not suffered an injury cognizable under the Equal Protection Clause. In distinguishing the earlier case, the Court noted that the *Warth* plaintiffs had made no claim that the construction association's members could not apply for permits on the same basis as other firms. The *Jacksonville* Court stated there was no equal protection injury in *Warth* because "[t]he firms' complaint ... was not that they could not compete equally; it was that they did not win." *Jacksonville*, 113 S. Ct. at 2304.

This Court's previous decisions regarding the goals of school desegregation and equal protection have focused upon providing the *opportunity* to obtain a benefit; not the ultimate benefit itself. Plainly, the District Court's original finding of discrimination in this case cannot be used to create a wholesale shift in equal protection injury analysis, particularly in light of the uncontested opportunity level created in KCMSD. Therefore, the Eighth Circuit's requirement of a guaranteed outcome far exceeds the Equal Protection Clause's mandate.

B. Factually and Constitutionally, the Eighth Circuit's Student Outcome-Based Standard is Untenable Because Factors Outside the Control of Government and Unrelated to De Jure Segregation Dramatically Affect Student Achievement.

This Court and others have long recognized that numerous factors beyond the provision of educational resources dispositively affect students' standardized test scores. This case presents a textbook example of that proposition. In *Board of Education v. Rowley*, 458 U.S. 176, 198 (1982), for example, this Court in dealing with a claim under the Education of the Handicapped Act, noted that

> a myriad of factors ... might affect a particular student's ability to assimilate information in the classroom.

Similarly, in *School Board of the City of Richmond v. Baliles*, 829 F.2d 1308, 1312-13 (4th Cir. 1987), the Fourth Circuit held that poverty and ineffective educational philosophy were responsible for remaining achievement disparities between majority and minority students. In the instant case, Judge Beam, writing for the five dissenters, correctly noted that:

> To require achievement test scores at or above the national norm is to require the school system to be responsible for circumstances beyond its control. Segregated housing patterns, poverty, street violence, drug usage, criminal activities and lack of parental involvement, if they exist in the KCMSD, are not the responsibility of the public school system.

Pet. App. A-64. The Eighth Circuit panel's initial decision simply assumed that the State could be required to fund programs to eliminate any deficiencies in student achievement test scores. It also assumed — without any basis — that the State could succeed in raising test scores, apparently through the continued application of massive resources, without even exam-

ining whether these or other factors would have any impact on student achievement.[10]

Conversely, this Court has routinely limited remedial responsibilities to matters within the control of defendants. As the Court stated in *Freeman*, "[w]here control lies, so too does responsibility." *Freeman*, 112 S. Ct. at 1445. Necessarily, where control does not lie, as in the case of student achievement, so too responsibility should not be imposed.[11] Similarly, this Court has recognized that "'[t]here are undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases.'" *Milliken II*, 433 U.S. at 280 (quoting *Milliken v. Bradley*, 418 U.S. 717, 763 (1974) (*Milliken I*) (White, J. dissenting)); *see also Swann*, 402 U.S. at 22 ("the elimination of

[10] The panel decision did not discuss any evidence on the influence of factors not within the control of the school system. Nor was any such evidence presented before the District Court because the requirement of improved student achievement first surfaced in the panel's opinion.

That factors other than educational resources determine results on standardized test scores has been recognized not only by the Fourth Circuit and the dissenting judges of the Eighth Circuit, but also in the scholarly literature. *See* W.L. Taylor, *The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. Rev. 1693, 1703 (1993) (link between concentration of poverty in public schools and performance on tests of basic reading skills); G. Jaynes and R. Williams (eds.), *A Common Destiny; Blacks and American Society*, 366, 369, 372, National Academy Press: 1989 (discussing effect of socioeconomic status, family size and peer pressure on educational outcomes); D. Armor, *Why is Black Educational Achievement Rising*, The Public Interest, Summer 1992, p. 66 ("It is well-documented that socioeconomic factors are among the major explanations of black-white achievement differences. . .").

[11] In language at odds with the opinions before this Court, the Sixth Circuit has held "[t]he Constitution imposes no duty on school officials to correct segregative conditions resulting from factors over which they have no control . . . ." *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1049 (6th Cir. 1977); see also *Higgins v. Board of Education*, 508 F.2d 779, 791 (6th Cir. 1974). Clearly, the principle applies equally to the quality education context.

racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage."). Indeed, any other standard would vitiate the holdings of *Dowell* and *Freeman* that desegregation remedies are temporary in nature and limited in purpose to eradicating vestiges of discrimination to the "extent practicable."

In light of the effect on student achievement exerted by non-instructional factors, the Court of Appeals' requirement of improved student achievement greatly exceeds the Fourteenth Amendment's guarantee of "equal educational *opportunity* for our Nation's children." *Missouri v. Jenkins*, 495 U.S. at 80 (Kennedy, J., concurring) (emphasis added). If permitted to stand, such a standard would mark a radical departure from this Court's established requirement that only purposeful discrimination is remediable under the Fourteenth Amendment, *see, e.g.*, *Washington v. Davis*, 426 U.S. 229, 240 (1976), and that, in any case, a constitutional remedy must be tailored to the injury caused by the constitutional violation. *Milliken II*, 433 U.S. at 281-82.

This Court recognized in *Freeman* that it was beyond the scope of a court's authority to require that a desegregation remedy alleviate conditions that were beyond the school district's power because to do so would mean such cases would never end:

> It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated.

Freeman, 112 S. Ct. at 1448. This principle from *Freeman* is consistent with the Court's admonition the previous term in

Dowell: "[w]e emphasize that federal judicial supervision of local school systems was intended as a temporary measure." *Freeman*, 112 S. Ct. at 1445. Similarly, in *Pasadena Board of Educ. v. Spangler*, 427 U.S. 424, 434-35 (1976), this Court declined to require continued supervision of a defendant school district which had complied with a desegregation order requiring a certain racial balance:

> [I]n this case, the district court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished that objective. That being the case, the district court was not entitled to require the [school district] to arrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the parts of the defendants, the district court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Id. at 436-37.

The Court of Appeals' requirement that the State and the KCMSD demonstrate a test score increase as a prerequisite to withdrawal of court supervision in this case would condemn the KCMSD to supervision by the Court for an indefinite period, contrary to the principles espoused by this Court in *Freeman* and *Dowell*. The KCMSD may well approve of continued judicial supervision, *see* Pet. App. A-62 (KCMSD Administrator endorsing a 100 year remedy), because that would keep extraordinary desegregation funds from the State flowing into the KCMSD. However, such indefinite judicial control is contrary to this Court's mandate that school districts under desegregation orders be returned to the control of State and local authorities once they are operating in compliance with the Constitution. This Court

has strongly emphasized local control of schools in its previous opinions, most recently in *Freeman:*

> As we have long observed, 'local autonomy of school districts is a vital national tradition.'

Id., 112 S. Ct. at 1445, *quoting Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977); see also *Dowell*, 498 U.S. at 248 (discussing "'the important values of local control of public school systems'"), *quoting Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1245 n. 5 (9th Cir. 1979) (Kennedy, J., concurring). The Eighth Circuit's ruling is precisely contrary to these holdings.

For these reasons, this Court should grant certiorari to reverse the Eighth Circuit's erroneous constitutional interpretation.

2. A Federal Court Order Granting Salary Increases to Virtually Every Employee of a School District as a Part of a School Desegregation Remedy Conflicts with Applicable Decisions of this Court, Which Require that Remedial Components Must Directly Address and Relate to the Constitutional Violation and be Tailored to Cure the Condition that Offends the Constitution.

In *Milliken I* this Court said that "[t]he controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation, *Id.*, 418 U.S. at 745 (citing *Swann*, 402 U.S. at 16). In *Milliken II* this Court held that federal court remedial orders must directly address and relate to the constitutional violation itself. *Milliken II*, 433 U.S. at 281-82. This Court has also held that before a court may impose a remedial program, it must be satisfied that "the constitutional violation caused the condition for which remedial programs were mandated." *Id.* at 286, n.17. In *Freeman* this Court followed that principle, stating that "a remedy is justifiable only insofar as it advances the

ultimate objective of alleviating the constitutional violation." *Freeman*, 112 S. Ct. at 1445.

This controlling principle, of course, is consistently applied in other cases dealing with remedies for constitutional violations:

> This principle was not one limited to school desegregation cases, but was instead 'premised on a controlling principle governing the permissible scope of federal judicial power, a principle not limited to a school desegregation context.'

General Building Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 399 (1982) (quoting *Hills v. Gautreaux*, 425 U.S. 284, 294 n.11 (1976)).

Here, the District Court has never found that low district-wide salaries violate either the constitutional rights of the students, teachers or other staff of the KCMSD or that they flow from any earlier constitutional violation by the State. Nevertheless, the Eighth Circuit panel affirmed the District Court's orders granting salary increases to virtually every employee within the KCMSD, without regard to whether they had instructional duties or even any interaction with the students.[12] Insofar as the District Court's order pertains to non-instructional personnel, it clearly does not address or relate to the constitutional violation upon which this remedy is premised — the defendants' historical denial of an equal educational opportunity.

The panel premised its ruling on the dubious and speculative assumption that providing salary increases to District employees would "improve the KCMSD's desegregative attractiveness." Pet. App. A-26. It is conceivable such an argument could apply to increases specifically tailored to attracting specialists needed to implement the magnet programs or to other necessary instruc-

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[12] The only District employees who do not receive court-ordered salary increases are the Superintendent and two highly-paid administrators.

tional personnel, who were unavailable for salary reasons. However, there is absolutely no legal or factual basis to assume that providing raises to parking lot attendants, custodians, cooks and other similar non-instructional personnel will reverse the effects of the defendants' past de jure discrimination. As Judge Beam noted, writing for the five judges dissenting from the denial of the suggestion for rehearing en banc:

> [T]he current effort by the KCMSD and the American Federation of Teachers (AFT), aided by the Plaintiffs, to bypass the collective bargaining process is uncalled for and is probably not an exercise reasonably related to the constitutional violations found by the Court in 1985. Further, it enables the KCMSD to involve the State, via the joint and several liability holdings of the Court, in pay raises the KCMSD probably could not impose upon its constituents. The Court's salary order also enables the teachers' union to achieve goals that would be unattainable under the bargaining process.

Pet. App. A-58. Judge Beam later added:

> I agree with the State that logic does not directly relate the pay of parking lot attendants, trash haulers and food handlers, for instance, to any facet or phase of the desegregation plan or to the constitutional violations.

The District Court's unprecedented salary order finds no support in the caselaw. In a decision setting a standard at odds with the decision below, the Second Circuit stated that a desegregation remedy should not be used to provide general upgrades to school systems implementing desegregation remedies:

> [A] court must be alert not to permit a school board to use a court's broad power to remedy constitutional violations as a means of upgrading an educational system in ways only remotely related to desegregation.

Arthur v. Nyquist, 712 F.2d 809, 813 (2d Cir. 1983). Justice Kennedy, writing for three other members of the Court, reaffirmed this principle in his concurring opinion in *Missouri v. Jenkins* 495 U.S. at 77.

The salary increase ordered here includes substantial numbers of personnel not remotely related to desegregation. The increases for non-instructional personnel cannot be justified under the previous holdings of this Court. As with the requirement of student test score increases, permitting school desegregation cases to be used for such purposes would establish an unsound precedent for remedies in desegregation cases as well as other cases involving institutional constitutional violations.

CONCLUSION

The Eighth Circuit's creation of an outcome-based student achievement standard for unitary status far exceeds the Equal Protection Clause's established guarantee of equal opportunity. It is neither traceable to any constitutional injury in this case nor is it a tenable standard. Moreover, in application it would plainly contravene this Court's recent pronouncements on the proper duration and purposes of desegregation remedies. Similarly, the Court of Appeals' ruling approving salary increases for all non-instructional personnel — paid for by extraordinary desegregation funds — is plainly outside the scope of a proper desegregation remedy. Therefore, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2238
No. 91-3636

Kalima Jenkins, by her friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Plaintiffs,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Roseann Bentley; Dan L. Blackwell; Gary M. Cunningham; Raymond McCallister, Jr.; Susan D. Finke; Thomas R. Davis; Cynthia B. Thompson, Members of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri,
Defendants-Appellants,

School District of Kansas City, Missouri
Claude C. Perkins, Superintendent thereof,
Defendants-Appellees.

No. 92-3194
No. 92-3200

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Intervenor-Appellee,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook,

Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education,
Defendants-Appellants,

School District of Kansas City;
Walter L. Marks, Superintendent thereof,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Missouri

Submitted: September 15, 1993
Filed: November 29, 1993

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The State of Missouri appeals from four orders of the district court[1] entered in the ongoing Kansas City school desegregation case. The district court ruled in two orders that base costs of the original group of magnet schools were properly included as desegregation costs, which the State could be required to pay as a result of its joint and several liability for desegregation expenses. The State argues that the district court erred in placing

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* Although we are aware that many of those named as defendants no longer hold their offices and substitution of public officers is automatic under Fed. R. App. P. 43(c), the parties have not notified us of the names of the successors in office. Therefore, we have not amended the style in this case.

[1] The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

this expense on the State, because in earlier orders the district court had required that these orders be paid by the Kansas City, Missouri School District. The State appeals the district court order approving certain quality education programs known as *Milliken II* programs after *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), for the 1992-93 school year.[2] The State contends that the *Milliken II* programs already in place had achieved the goals set for them, and had attained unitary status under *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), and the district court erred in not recognizing this and in ordering further programs. Finally, the State appeals from orders requiring the State to pay for a salary increase for KCMSD teachers and other employees. We affirm the orders of the district court.

I.

The first two appeals involve orders allowing the base costs of the "flagship magnets" as desegregation expenses for which the State and KCMSD are jointly and severally liable. The flagship magnets (also referred to as the "1986-87" magnets in reference to their inception date) are schools that existed before the desegregation remedy and were converted into magnet schools as part of the desegregation remedy.[3] The costs that KCMSD would have incurred in running these schools, regardless of the desegregation remedy, are referred to as "base costs." Costs associated with the magnet themes are called "incremental magnet costs."

In the original magnet school order, June 16, 1986, the court made no distinction between base costs and incremental costs for

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[2] The *Milliken II* programs included extended day, effective schools, 1986-87 magnets, district communications, security, playground equipment, Central High School athletic team travel, and extended day program for Westport School.

[3] The flagship magnets are the three schools of the Southwest cluster (Cook, Hartman, and Marlborough), Swinney and Volker, and the Lincoln College Preparatory magnet.

the flagship schools, but classified the total amount as a desegregation expense, allocating half to the State and half to the KCMSD. *Jenkins v. Missouri*, 639 F. Supp. 19, 53-55 (order on pending motions) (W. D. Mo. 1985), *aff'd*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied as to this order*, 490 U.S. 1034 (1990). The State alluded to this very briefly in an appeal of that funding order, complaining that the district court "held all of the operating costs of the schools, whether part of the original budgets or newly ordered by the court, were to be counted as necessary desegregation expenses," and that the court had "effectively transfer[red] to the desegregation plan all of the operating expenses of the schools." We affirmed the June 16, 1986 order, though without discussion of this point. *Jenkins v. Missouri*, 855 F.2d 1295, 1319 (8th Cir. 1988) (*Jenkins II*), *cert. denied in relevant part*, 490 U.S. 1034 (1989).

The district court in November 1986 ordered a more extensive "Long Range Magnet Plan" which created new magnets in addition to the flagship magnet schools. The Long Range Magnet Plan budget distinguished between base and incremental costs for the new magnets, and required the KCMSD to pay base costs from its operating budget. On July 25, 1988, the district court decided that the flagship magnets and the new magnets should be funded according to the same principles, and that it would therefore not require the State to pay the base costs for the flagship magnets for 1988-89. Because the KCMSD could not show which costs were base and which incremental, the court simply included the whole cost in the desegregation budget, but allowed the State a credit for the base amount, which was to be determined later. The court issued a similar ruling for 1989-90.

Before the State obtained the benefit of these credits, however, money problems intervened. The court stayed the orders requiring the KCMSD to pay the 1988-89 and 1989-90 base costs, pending a review of KCMSD's finances by an independent

consulting firm to determine what KCMSD could pay for out of its operating budget.[4]

Two orders are on appeal, dated June 26, 1990 and July 5, 1991, in which the district court approved the total expenses for the flagship magnets as desegregation expenses for the years 199091 and 1991-92, respectively. In those orders, the court allocated the flagship base costs entirely to the KCMSD, but the effect of joint and several liability is that the State could be called on to pay these costs. In the 1990-91 order the court stated that the consultant's study was still pending, and that if the report should result in the February 1, 1990 stay order being lifted, the State could receive a credit for the base costs. In the 1991-92 order the court stated the budget study did not indicate that the KCMSD had the money to pay the base costs from its operating budget, and therefore, the costs would have to be shifted to the desegregation budget.

The State's objection is that by designating the 1990-91 and 1991-92 base costs as desegregation expenses, payable by the KCMSD, the court is indirectly requiring the State to pay the costs, through the operation of joint and several liability. The State raises four arguments against such a result.

First, the State argues that requiring it to pay for the ordinary costs of operating KCMSD's schools is impermissibly granting relief not related to the State's constitutional violation, since KCMSD would have had to pay the operating costs of its schools, whether or not the State ever committed a constitutional violation.

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[4] By later agreement of the parties, the State actually recovered the money from the 1988-89 and 1989-90 credits, out of the proceeds from property taxes that had been paid into escrow but were released for the District's use after the Supreme Court affirmed the property tax order under which they were authorized.

The cases the State cites are not directly applicable, since they either address situations in which there was no relation between the remedy ordered and the constitutional violation,[5] or simply refer generally to the requirement that the remedy be limited to rectifying conditions that offend the Constitution.[6] As we discuss at length in Part II, the effect of the constitutional violations in this case was to lessen student achievement in the KCMSD and to cause white flight. *Jenkins II*, 855 F.2d at 1300. It has already been determined that the proper remedy for these injuries is to improve the quality of education given to minority students and to implement superior educational programs that will attract white students back to the District and redistribute the whites concentrated in certain parts of the District. *Id.* The flagship magnet schools are a cornerstone of the remedial plan. The relation between payment of the magnets' base costs and the success of the constitutional remedy is evident. If KCMSD cannot pay the basic costs of keeping the schools open, the magnet programs at those schools cannot go forward and the remedial plan will be stillborn. It is therefore consistent with *Milliken II* to require the State to pay costs the KCMSD would have been otherwise responsible for when KCMSD cannot pay, and when failure to pay would fatally undermine the constitutionally-mandated remedy. In fact, it is settled law in this circuit that a desegregation remedy can require the State to pay the entire costs of educating at least some of a district's students, since we affirmed such an order in St. Louis over the same sort of objection the State makes here. *See Liddell v. Missouri*, 801 F.2d 278, 282-83 (8th Cir. 1986) (*Liddell IX*).

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[5] *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (*Milliken I*); *Liddell v. Missouri*, 731 F.2d 1294, 1309 (8th Cir.) (*Liddell VII*), *cert. denied*, 469 U.S. 816 (1984).

[6] *Freeman v. Pitts*, 112 S. Ct. 1430, 1445 (1992); *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977) (*Milliken II*); *Swann v. Charlotte - Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971); *Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983), *cert. denied*, 466 U.S. 936 (1984).

Next, the State argues that the district court's decision to place the base costs in the desegregation budget is inconsistent with other decisions that the district court has made in this case. The State argues that the authority of the court's orders separating base and incremental costs for the flagship magnets' 1988-89 and 1989-90 funding is not affected by the February 1, 1990 stay of those orders and the rationale of those orders should govern later years. We have recognized the practical flexibility of the court in shaping remedies and adjusting and modifying injunctions in *Jenkins v. Missouri*, 931 F.2d 470, 482 (8th Cir.) (*Jenkins III*), *cert. denied*, 112 S. Ct. 437 (1991), particularly where there are changed circumstances. The district court exercised this flexibility when it changed from full desegregation funding for the flagship magnets (as it had ordered before 1988-89) to separating base from incremental costs. In response to a budget study which "did not indicate that the KCMSD has resources available from its operating budget to support the base budgets," the court once again consolidated the base costs with incremental costs. There was adequate rationale for the change and the 1990-91 and 1991-92 orders do not conflict with the court's earlier treatment of the base costs.

The State quotes language from the district court opinion of July 5, 1991, in which the court rejected the KCMSD's "no money" argument in another context. The KCMSD had argued that because it was always out of money and could not pay for its operating costs, its operating and desegregation budgets should be merged, with the State required to pay any expenses the KCMSD could not afford. The district court rejected this argument, stating, "There is no legal authority for essentially transforming the State into a guarantor of KCMSD operating budget shortfalls." Order of July 5, 1991 at 9. The court then advised KCMSD either to pursue additional funding or to institute cuts to balance its operating budget. Even granting that there may be tension between the July 5, 1991 decision and the orders before us, the district court did not err or abuse its discretion in making

an adjustment or modification of its earlier equitable orders dealing with the flagship magnets' funding, so vitally important to the remedy of the constitutional violations.

Finally, the State suggests that the entire issue should be remanded to the district court for reconsideration in light of the State's enactment of a new school finance formula, which the State argues will provide significantly greater state funding to KCMSD. This new development may well affect funding in future years, but at this point we simply do not know how. Any effect it may have will be determined by the district court as it considers future funding orders. It is not appropriate that we consider it in the first instance.

The parties evidently delayed the presentation of this appeal for some time in the hopes that the issue would be settled by the report of the independent consultant. It was only when the report's result did not reveal sufficient money available to KCMSD to solve the problem that the State prosecuted its appeal. We view this as a recognition of the need to balance the many conflicting issues in crafting an appropriate remedy, and this further supports our conclusion that we should affirm the district court's orders with respect to the base costs of the flagship magnets.

II.

The State argues that the district court erred as a matter of law or, in the alternative, abused its discretion by failing to address in its June 17, 1992 order the State's argument that the *Milliken II* quality education programs were unitary. Even if the district court was not obliged to make findings on this issue, the State argues that it abused its discretion in failing to hold the district unitary in the quality education area. We affirm the district court's judgment.

KCMSD submitted its motion for approval of the desegregation plan for 1992-93, including continuation of the *Milliken II*

programs, which the court had originally approved in order to improve student achievement in the KCMSD. While the KCMSD's motion was pending, the United States Supreme Court decided *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). The State then relied on *Pitts* to argue that the *Milliken II* programs had been implemented fully and that the court should declare these programs unitary and return responsibility for them to the school district. The court held a hearing on the 1992-93 budget issues on May 27 to 29, 1992, and while rejecting some requests, ordered most of the *Milliken II* programs fully funded.

The June 17, 1992 order approved the KCMSD's 1991-92 budgets without comment. Order of June 17, 1992 at 7. In granting the funding, it is evident that the district court rejected the State's arguments. The district court did not err in so ruling, even though it did not articulate its reasoning in approving the funds. Rejection of the State's argument is demonstrated by the district court's failure to make findings based on these arguments. *See Switzer Brothers, Inc. v. Locklin*, 297 F.2d 39, 45 (7th Cir. 1961) ("[F]ailure to enter findings with respect [to certain evidence] is tantamount to findings adverse to appellants upon the evidence."), *cert. denied*, 369 U.S. 851 (1962). The district court need not make specific findings on all facts, but must only rule on the ultimate facts necessary to reach a decision in the case. *United States v. F.D. Rich Co., Inc.*, 439 F.2d 895, 899 (8th Cir. 1971); *Falcon Equip. Corp. v. Courtesy Lincoln Mercury, Inc.*, 536 F.2d 806, 808 (8th Cir. 1976) ("It is well established that the trial court does not need to make specific findings on all facts but only must formulate findings on the ultimate facts necessary to reach a decision."). The district court's order some nine months later in which it anticipated an orderly and gradual withdrawal of court control demonstrates the court's grasp of the *Freeman v. Pitts* argument asserted by the State, and of the issues there raised.

Were we to entertain any question about the import of the district court's June 17, 1992 order, the district judge's comments from the bench during the hearing and later orders raising the same or similar issues answer our concerns. The State argues that the court should have declared the KCMSD unitary in regard to the quality education programs because the only goal of the desegregation remedy is the "full implementation" of the remedial programs, which the State asserts it has accomplished. However, during the hearing the court pointed out that the goal was not to implement certain programs, but rather to integrate the school district. Judge Clark stated:

> The [c]ourt's goal was to integrate the Kansas City, Missouri, School District . . . and all these other matters were elements to be used to try to integrate the [KCMSD] . . . . That's the goal. And a high standard of quality education. The magnet schools, the summer school program and all these programs are tied to that goal. . . . But when [the State] says no particular goal has been set, I think [it is] in error.

Judge Clark's order rejecting funding for some of the programs and granting funding for continuation of other programs could only have done so on the basis that the goals of the desegregation programs, the elimination of the vestiges of past discrimination to the extent practicable, had not yet been achieved.

Because this desegregation litigation is ongoing, we also find it appropriate to refer to later orders which show that the district court considered and rejected the State's arguments. Nine months after the order giving rise to this appeal, the court considered a motion for approval of the Long Range Magnet Renewal Plan. On April 16, 1993, the district court entered an order which dealt more explicitly with many of the arguments now urged by the State. Order of April 16, 1993. None of the parties has appealed this April 1993 order. Yet, this order helps illuminate the June 1992 order now before us. In the April order, the district court made the sort of findings contemplated by *Freeman*, anticipating an orderly and gradual withdrawal of court control. *See* 112 S. Ct. at 1445.

In the April 1993 order, the district court defined the first issue as whether the magnet programs have improved the educational lot of the victims of unconstitutional segregation and whether approval of the Long Range Magnet Renewal Plan would likely result in additional educational progress. The second issue was whether the original Long Range Magnet Plan had helped the KCMSD reverse white flight, and whether the Long Range Magnet Renewal Plan would bring more white students into the District. The third issue the court considered was whether the magnet programs have redistributed the students within KCMSD for maximum desegregation and whether the Renewal Plan would result in stabilization and further enhancement of desegregative gains.

The district court commented on the substantial progress made in desegregating KCMSD schools. The court found that there had been a trend of improvement in academic achievement, but that the school district was far from reaching its maximum potential because KCMSD is still at or below national norms at many grade levels. Order of April 16, 1993 at 11. The court observed that the magnet school plan has been successful overall, with a substantial pool of suburban whites expressing an interest in attending KCMSD magnet schools. *Id.* at 9. The educational opportunities afforded in the magnet schools are better than previously available. *Id.* at 13. The court then extended the duration of the magnet plan. *Id.* at 14. The court stated that it was important to maintain the magnet plan as it is because of the positive impact on both the desegregation effort and on achievement. *Id.* at 20. The court ordered a two-year extension of the current plan (with certain modifications) in order to maintain the integrity of the programs currently offered, and to allow the KCMSD to better measure the effectiveness of the programs. *Id.* The court expressed a need for the parties' views of an effective method by which the district may fund its share of the programs. It directed the KCMSD to submit a plan commensurate with current funding or at a level permitting

maintenance of the same quality of both facilities and instruction, assuming withdrawal of court ordered funding at alternative intervals of three, five, seven or ten years. *Id.* at 21.

In essence, the court's order indicated that the magnet school plan had been substantially successful, that further areas for improvement still existed, and that the court was looking forward to the day when a gradual phase-out would be considered. This order specifically addresses the issues raised by *Freeman v. Pitts*. *See* 112 S. Ct. at 1446 (listing factors a district court must consider to order a partial withdrawal of its supervision).

Further, the district court's July 30, 1993[7] order regarding *Milliken II* programs expressly decides these issues. The State appealed this order but raised no *Freeman v. Pitts* arguments; the State only attacks the salary issue. We refer to the July 1993 order only as it fleshes out the meaning of the earlier district court orders dealing with the *Freeman* issues. In the July order the district court stated that it had previously ruled in the April 16, 1993 order as a result of the Long Range Magnet Renewal Plan that "KCMSD has not met the goals and standards set by the [c]ourt in establishing the desegregation remedy." Order of July 30, 1993 at 3. The court unambiguously stated: "The court finds that the State's arguments that these components have attained unitary status are unpersuasive." *Id.* These statements leave no doubt that the court rejected the State's *Freeman* arguments in July 1993, and it follows that in this ongoing litigation, it did so in the earlier orders dealing with the issue.

The court said next that the State argues inconsistently that the desegregation plan is a complete failure, but on the other hand, that the *Milliken II* components are completely successful. The court also concluded that the State has continued to make fundamentally flawed arguments in pursuit of an order determin-

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[7] This appeal bears our docket No. 93-3274, and was argued November 3, 1993.

ing unitary status in the KCMSD. The court found that the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy, but the components have not yet met these goals in their entirety. The court's statements in its July 30, 1993 order, which the State referred to only most obliquely in the argument of the issues before us, substantiates our reading and interpretation of the orders heretofore entered by the district court.

The State next argues that even if we conclude (as we have) that the district court was not obligated to issue findings of fact regarding the success of the *Milliken II* programs, the district court abused its discretion when it held that the *Milliken II* programs were not unitary. The essence of the State's argument is that it complied fully and satisfactorily with all court orders, insofar as the remedial programs have been fully implemented and funded for a seven-year period. This, it argues, is the extent of its liability. We reject the State's argument that the District has achieved unitary status regarding the quality education offered its students.

The Supreme Court has twice in recent years considered the standards to be employed in determining whether a school system has become unitary.

First, in *Board of Education of Oklahoma City v. Dowell*, 111 S. Ct. 630, 636 (1991), the Supreme Court stated that in determining whether there was constitutional compliance in a school desegregation case, the district court "should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable." *Id.* at 638. The Court itemized a number of facets of school operation that a court should consider in determining whether the vestiges of *de jure* segregation had been "eliminated as far as practicable," including "student assignments, . . . 'faculty, staff, transportation, extra-curricular activities and fa-

cilities.'" *Id.* (quoting *Green v. New Kent County School Bd.*, 391 U.S. 430, 435 (1968)).[8]

Second, in *Freeman v. Pitts*, the Court dealt specifically with whether a district court could withdraw incrementally from supervising a school desegregation case. The Court held that the Court of Appeals for the Eleventh Circuit erred in requiring retention of full remedial authority until a school district had achieved unitary status in all categories. 112 S. Ct. at 1446.

In discussing the meaning of "unitary," *Freeman* began with the basis for the court's exercise of equitable power. The Court stated:

> The essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action. Equitable remedies must be flexible if these underlying principles are to be enforced with fairness and precision. . . . "The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution." The requirement of a unitary school system must be implemented according to this prescription.

Id. at 1444 (citations omitted).

Freeman stressed that the end purpose of a court's supervision is to remedy the violation and then to restore to state and local authorities control of the school system. *Id.* at 1445. Partial relinquishment of judicial control can be a significant step in fulfilling the district court's duty to return the control of schools to local authorities. *Id.* "A transition phase in which control is relinquished in a gradual way is an appropriate means to this end." *Id.* The Court continued:

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[8] Another factor to be considered is the quality of education offered to the white and black students. *See Freeman*, 112 S. Ct. at 1437.

> [O]ne of the prerequisites to relinquishment of control in whole or in part is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution.

Id.

Freeman authorizes a district court to relinquish control in stages, outlining the analysis it should follow and requiring careful articulation of its reasoning. The district court is given discretion based upon its assessment of many factors, some of which are most intangible:

> A court's discretion to order the incremental withdrawal of its supervision in a school desegregation case must be exercised in a manner consistent with the purposes and objectives of its equitable power. Among the factors which must inform *the sound discretion* of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system, and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance.

Id. at 1446 (emphasis added).

In order to analyze this case under *Freeman v. Pitts* to determine if KCMSD has achieved unitary status, we must consider the constitutional injury, the methods selected to remedy that injury, the goals of the remedy, and the success achieved by the remedy.

Of course, the injury is that vestiges remain of the dual school system once required by the State of Missouri. Those vestiges take the form of reduced student achievement and white flight, resulting in the anomaly of a racially isolated school district in the midst of a population with a far different racial makeup. In *Jenkins II*, we quoted the district court's findings:

> "[W]itnesses confirmed the conclusion reached by the Supreme Court in *Brown I* [*Brown v. Board of Educ.*, 347 U.S. 483 (1954)] that forced segregation ruins attitudes and is inherently unequal .... The general attitude of inferiority among blacks produces low achievement which ultimately limits employment opportunities and causes poverty.""Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD."
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> ...
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> The district court found that segregation in KCMSD caused the departure of the whites in the system to private schools and to the suburbs. During the years between *Brown I* and trial, the enrollment of KCMSD shifted from predominantly white to predominantly black. In the 1958-59 school year, blacks constituted 22.5% of KCMSD enrollment, but by 1983-84 enrollment was 67.7% black and white enrollment had dropped 80%. "[A]s of 1974, 20 years after *Brown I*, 39 schools were more than 90% black .... Eighty percent of all blacks in the District attended schools that were 90% black...." KCMSD later reduced the number of over-90%-black-enrollment-schools, but the district court found in 1984 that KCMSD had still not completely dismantled the dual system.

855 F.2d at 1300 (citations omitted).

The remedy consisted of a capital improvements plan to rectify the decay in the school's physical facilities,[9] numerous quality education programs, and a far-reaching magnet school plan. The goals of the remedial programs were: (1) to compensate the victims by improving the education given them; (2) to enhance the programs so as to reverse the white flight pattern, winning back white students from private and suburban schools, and thus ending the racial isolation of the victims; and (3) to use the magnet schools as a way of bringing about voluntary redistribution of children within the KCMSD itself. *Id.* at 1302.

The substance of the State's argument is that the *Milliken II* quality education programs have been established successfully and are of superior quality to those programs offered in the suburban school districts and, therefore, that the goal of ameliorating inferior educational opportunities has been accomplished. The State presented Dr. Terrance Stewart, Assistant Commissioner of Education for the State of Missouri, as its witness with respect to the implementation of the *Milliken II* programs. The district court viewed his testimony as giving a glowing report of the success of the programs. However, the court made clear that the goal was to integrate the Kansas City, Missouri School District, and that the various programs were tools to be used to do so. The court rejected Dr. Stewart's argument that no goals had been achieved. It is also significant that the testimony of Dr. Stewart did no more than describe the successful establishment of the several educational programs, but gave no indication of whether these programs had succeeded in improving student achievement. On the other hand, KCMSD's Superintendent Walter Marks, and Assistant Superintendent of Instruction Art Rainwater, testified that while the programs had been established and progress was being made both in academic achievement and reduction of racial isolation, much remains to be done.

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[9] The capital improvements are not before us in this appeal. *But see Jenkins II*, 855 F.2d at 1300, 1306-07.

The only evidence before the district court with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made. The evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable. *See Freeman*, 112 S. Ct. at 1446 (quoting *Dowell*, 111 S. Ct. at 638). These tests, articulated in *Dowell* and *Freeman*, answer the State's argument that establishment of the programs by compliance with the court order is all that is required.

Further, *Freeman* did not indicate that the State is entitled to be released upon accomplishment of any particular objective without also considering whether retention of judicial control was necessary or practicable to achieve compliance with the decree in other facets of the school system. The State did not try to prove that it has demonstrated a good faith commitment to the whole of the court's decree. *See Freeman*, 112 S. Ct. at 1446; *see Brown v. Board of Educ.*, 978 F.2d 585, 592 (lOth Cir. 1992) ("[S]pecific policies, decisions, and courses of action that extend into the future must be examined to assess the [defendant's] good faith."), *cert. denied*, 113 S. Ct. 2994 (1993).

KCMSD argues that the State's evidence is insufficient to justify exercise of the court's discretion to grant unitary status under *Freeman*. KCMSD's argument has much merit, but the State asks only that we hold the district court abused its discretion in continuing the education programs.

We have considered the State's arguments in considerable detail, and we are satisfied that Judge Clark's comments during the four-day hearing show that he fully considered the State's *Freeman* arguments. In his order, he rejected funding for some of the programs, while granting the funds for others; thus, he implicitly rejected the State's *Freeman* arguments. While it might have been desirable for the court to articulate explicitly even a conclusory rejection of the State's *Freeman* arguments,

the district court did not abuse its discretion in continuing the quality education programs.

In view of the State's arguments that under *Freeman* it is entitled to a determination on an incremental basis that KCMSD has become unitary, a few further words are appropriate.[10] *Dowell* and *Freeman* both outline in considerable detail the nature of the inquiry the district court must undertake in considering this issue. These principles must be applied in analyzing the question of unitariness to determine whether there has been a successful remedy for the constitutional violations that have been found to exist in KCMSD. Our earlier opinions which we have discussed above, particularly *Jenkins II* and the district court orders there in issue, set forth in detail the constitutional violations and the impact upon the District. It goes without saying that careful factfinding and detailed articulation of findings will be required, particularly with respect to whether vestiges of discrimination have been eliminated to the extent practicable, and thus certain aspects of KCMSD have become unitary. It is evident that in considering the various parts of the remedy, some questions will be far more easily resolved than others. The improvement of the physical facilities is one that lends itself to relatively simple quantification. Questions of student assignments, faculty and staff composition, as well as extra-curricular activities and facilities, are only slightly more complicated.

When the question of quality of education is reached, however, the issue is far more complex. The district court correctly observed that implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the system-wide reduction in student achievement,

[10] Another part of the remedy we have stressed repeatedly is the development of a voluntary inter-district plan. We observe once again that the only implementation of any such plan is the ten student exchange with the Missouri City schools.

have been eliminated to the greatest extent practicable. The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation. It will take time to remedy the system-wide reduction in student achievement in the KCMSD schools, and the orders of the district court reflect that it is aware of this fact.

We must also recognize that the funding problems are an inherent part of the entire problem in KCMSD, as we observed in *Jenkins II*, 855 F.2d at 1305. The atmosphere within the community and the legal climate within the State have prevented KCMSD from raising the necessary funds to maintain its schools and to fund remedial programs. These are all aspects that the district court must consider as it continues to address this issue in the future.

III.

The State also argues that the district court erred as a matter of law in approving salary increases for KCMSD employees in its order of June 25, 1992. Order of June 25, 1992 at 15-16. The State argues first that the salary increase remedy sought exceeded that necessary to remedy the constitutional violations, and alternatively, that if the district court had lawful authority to impose the increases, it abused its discretion in doing so. We reject the State's arguments and affirm the district court's June 25, 1992 order granting the salary increases.[11]

On September 15, 1987, the district court ordered salary increases to be paid out of the desegregation budget, finding that high quality personnel are necessary not only to implement specialized desegregation programs intended to improve educa-

[11] The salary increases called for in the court's order had been completely paid when argument was heard in this case. Presumably, the State would seek recovery of the funds from KCMSD, and whether there is a practical effect, in view of joint and several liability, is a question that we need not ponder.

tional opportunities and reduce racial isolation, but also to ensure that there is no diminution in the quality of its regular education programs. *Jenkins*, 672 F. Supp. 400, 410 (W.D. Mo. 1987), *aff'd in relevant part*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied as to relevant part*, 490 U.S. 1034 (1989). Additional increases to be paid from the desegregation budget were sought in 1990, and after several days of hearings in June of that year, the parties reached a settlement as to salary increases to be paid equally by the State and KCMSD, with KCMSD's fifty percent share to be funded by an increase in the real estate tax levy from $4 per $100 valuation to $4.96. The settlement specifically provided that joint and several liability would not apply to these salary obligations. The parties in this litigation did not appeal from the order, and this court dismissed an appeal filed by a group of taxpayers. *Jenkins v. Missouri*, 967 F.2d 1245, 1248 (8th Cir.) (property owners' notice of appeal was ineffective since they did not move to intervene until time to appeal had already expired), *cert. denied*, 113 S. Ct. 811 (1992).

In early 1992 the American Federation of Teachers and KCMSD sought additional increases in salaries to be paid as desegregation expenses. The State opposed the increases and argued that the court should order a roll-back of salaries of the KCMSD staff to the 1986-87 levels because the salary increases did not meet the goals set by the court.

After a hearing lasting four days, the district court entered its order approving the salary increases. Order of June 25, 1992 at 16. The court set forth in detail the respective contentions of the parties and supporting evidence and ordered the State to fund fifty percent of the increases and KCMSD to fund fifty percent, with joint and several liability. Most importantly in this order, the court found that Kansas City, Missouri is part of the national urban market, and that other cities are competing for Kansas City's teachers and staff. The district court found that the State's roll-back proposal would drastically impair implementation of

the desegregation remedy. Order of June 25, 1992 at 13. The district court concluded that logic and empirical data showed that in an absence of desegregation funding for salaries, the District would not be able to implement the desegregation plan. *Id.* at 12. Quoting *Freeman v. Pitts*, the court found that the "essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action." *Id.* at 12 (quoting *Freeman v. Pitts*, 112 S. Ct. at 1444). The court referred to its ruling in 1989 that KCMSD's difficulty in hiring and retaining qualified personnel adversely affected the desegregation plan. *Id.* at 13 (citing Order of July 5, 1989 at 23). In approving the 1990 salary package, the court found that salary increases for KCMSD's personnel were "essential to comply with the [c]ourt's desegregation orders." Order of June 25, 1992 at 13 (quoting Order of July 23, 1990 at 6). The district court also referred to its earlier orders and decisions of this court that high quality personnel are necessary not only to implement specialized desegregation programs intended to improve educational opportunities and reduce racial isolation, but also to "insure that there is no diminution in the quality of its regular academic program." *Jenkins v. Missouri*, 672 F. Supp. at 410. The court found: "In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators and staff." Order of June 25, 1992 at 15. Finally, the district court concluded that the basis for its ruling is grounded "in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD." *Id.*

The State makes no claim that the findings of fact of the district court are clearly erroneous. Instead, it simply argues that as a matter of law there is no support for the district court's order, and if there is such support, the district court abused its discretion in ordering the salary payments. In great part, the State seems to be urging that we review the issue de novo based upon factual

arguments that it now asserts, many based on evaluative criteria it claims the district court had adopted.

The State's legal argument is that the district court should have denied the salary increase funding because it is contrary to *Milliken II* and *Swann* in that it does not directly address and relate to the State's constitutional violation. The State argues that low teacher salaries do not flow from any earlier constitutional violations by the State. The State particularly targets pay of non-teacher personnel as beyond the power of the court to reach.

The State's argument requires that we look again to the finding, which we affirmed in *Jenkins II*, 855 F.2d at 1300, that "[s]egregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD" as well as departures of whites to private schools and suburbs. The goals of the remedial programs are to improve the educational lot of the victims of unconstitutional segregation, to regain some portion of the white students who have fled the District and retain those that are still there, and to redistribute the students within the KCMSD to achieve the maximum desegregation possible. 855 F.2d at 1302. The State has too narrow an approach to the nature of the constitutional violation and injury, which is extremely broad. *See* pages 17-18, *supra*. In addition to compensating the victims, the remedy in this case was also designed to reverse white flight by offering superior educational opportunities. *See Jenkins II*, 855 F.2d at 1302.

Contrary to the State's argument, the issue is not that low teacher pay in and of itself is a constitutional violation that must be remedied, but rather the systemic reduction of student achievement and white flight which require as part of the remedy quality education programs and magnet schools. This remedy finds its earliest support in *Milliken II*, which stated: "In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation .... [T]he decree ... must be designed

as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" 433 U.S. at 280 (citations omitted). *Milliken II* discussed educational remedies deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education provided in a non-discriminatory manner in a school system free from pervasive dejure racial segregation. *Id.* at 282. *Milliken II* specifically approved remedial education programs "to overcome past inadequacies and to compensate minority children for unequal educational opportunities resulting from past or present racial and ethnic isolation." *Id.* at 284-85. Indeed, *Milliken II* looked to habits of speech, conduct, and attitudes reflecting cultural isolation as conditions that the remedy could appropriately address. *Id.* at 287.

The establishment of the quality educational programs in KCMSD springs from these roots and from the ample findings that we have reviewed on numerous occasions.

To this beginning proposition we must then add the findings of the district court that salary funding is necessary to implement the desegregation plan. The court stated in its June 1992 order that "[l]ogic and empirical data show that in the absence of desegregation funding for salaries, the district will not be able to implement its segregation plan. " Order of June 25, 1992 at 12. It was particularly appropriate that in this same order the district court looked to the language in *Freeman v. Pitts* that "[t]he essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action, " slip op. at 12 (quoting *Freeman*, 112 S. Ct. at 1444), and further that a district court may require the expenditure of funds to implement a desegregation remedy, slip op. at 12 (citing *Milliken II*). The court looked to its earlier holdings that KCMSD's difficulty in hiring and retaining qualified personnel adversely

affected the desegregation plan. Slip op. at 13. "High quality personnel are necessary not only to implement specialized desegregation programs intended to 'improve educational opportunities and reduce racial isolation,' but also to 'ensure that there is no diminution in the quality of its regular academic program.'" *Id.* at 13 (citing *Jenkins II*). The court also found that to improve the KCMSD's desegregative attractiveness, KCMSD must be able to hire and retain high quality teachers, administrators, and staff. Slip op. at 15.

What we have said, coupled with the district court's findings detailed above, demonstrates the legal basis for the court's salary orders. Further, as we said in discussing the decay of the district's physical facilities in *Jenkins II*, the constitutional violations by the State and failure to remove the vestiges of the dual school system "'contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools.'" 855 F.2d at 1305. The same principle applies equally to the salary issue before us. In *Jenkins II* we rejected an argument similar to that asserted by the State today. It is also significant that the district court, in its first order relating to salaries, specifically referred to the deterioration in KCMSD's teacher salary position because of failure to obtain passage of a tax levy. *Jenkins v. Missouri*, 672 F. Supp. at 410.

We reject the State's argument that the salary order entered by the district court was without lawful authority. We are satisfied that the district court's factual findings provide sufficient underpinning for the legal conclusion the district court reached in this case.

We need not engage in a detailed analysis of the State's factual arguments. There was substantial evidence to support the district court's findings we have referred to above. Further, the court heard testimony from the State's experts that there was a statistically significant, positive change in the turnover rates for full-

time employees after the earlier salary increase, that the percentage of certified employees selecting KCMSD dramatically increased because of the earlier salary increases, that the percentage of employees lost to other school districts after the salary increase declined significantly, and that the average performance evaluation for the professional employees increased positively and significantly. The record provides ample support for the district court's findings, and we conclude that it did not abuse its discretion in approving the salary increases.

We affirm the various orders entered by the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3274

Kalima Jenkins, by her friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Intervenor-Appellee,

v.

State of Missouri; Mel Carnahan, Governor of the State of Missouri; Bob Holden, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M.

Williams, Member of the Missouri State Board of Education; Jacqueline Wellington, Member of the Missouri State Board of Education,
Defendants-Appellants,

School District of Kansas City
Walter L. Marks, Superintendent thereof
Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri

Submitted: November 3, 1993
Filed: December 8, 1993

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.
JOHN R. GIBSON, Circuit Judge.

The State of Missouri once again appeals from orders of the district court[1] granting salary increases to KCMSD personnel as part of the remedy in the ongoing Kansas City school desegregation case. *Jenkins v. Missouri*, No. 77-0420-CV-W-4 (W.D. Mo. June 30 and July 30, 1993). We affirm.

We have in our most recent opinion affirmed salary orders entered by the district court on June 25, 1992. *Jenkins v. Missouri*, No. 90-2238 (8th Cir. Nov. 29, 1993). In our opinion we outlined the history of the court's orders dealing specifically with salaries as a part of the desegregation remedy, including the original salary order of September 15, 1987, and a settlement reached by the parties in 1990, and finally, the affirmance of the

[1]The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

1992 order. We need not repeat that history which is set out in our earlier opinion. Slip op. at 21-27. Additional hearings were held on salary motions for the school years 1993-94, 1994-95, and 1995-96, and the district court in an order dated June 30, 1993 granted salary increases to be effective in the three school years.

I.

The State first argues that the district court should have denied the salary increase funding, as it is contrary to *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*), in that it does not directly address and relate to the constitutional violation. The State argues that low teacher salaries do not flow from any earlier constitutional violations by the State, and therefore violate *Milliken II*, as well as *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), requiring the remedial steps be carefully tailored to correct the vestiges of prior desegregation and no more. The State particularly targets pay of non-teacher personnel as not flowing from constitutional violations by the State, and beyond the power of the court to reach.

We have rejected the same arguments with respect to the 1992-93 salary funding order. *See Jenkins v. Missouri*, No. 90-2238, slip op. at 21-27 (8th Cir. Nov. 29, 1993). We reasoned that quality education programs and magnet schools were a part of the remedy for the vestiges of segregation causing a system wide reduction in student achievement in the KCMSD schools. *Id.* at 24-26. Further, we pointed to the district court's findings that the failure to remove the vestiges of the dual school system precipitated an atmosphere which prevented KCMSD from raising necessary funds, specifically those to maintain required salary levels. *Id.* at 26-27. It is significant that in its order for the earlier year the district court underscored the language from *Freeman v. Pitts*, 112 S. Ct. 1430, 1444 (1992), that "[t]he essence of a court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action." Order of June 25, 1992 at 12. The significant finding of the court with respect to the earlier funding order was that the salary increases were essential to comply with the court's desegregation orders, and that high quality teachers, administrators, and staff must be hired to improve the desegregative attractiveness of KCMSD.

We reject the State's argument that the salary order is contrary to *Milliken II* and *Swann*.

II.

The State next argues that the district court's finding that KCMSD competes in a national urban market for teachers is clearly erroneous. We first observe that this is an argument that the State did not make with respect to this same finding in the June 1992 district court order. The essence of the State's argument is that it presented four witnesses on the issue of the national urban market, that there was and is no national urban market from which school districts compete for staff in any significant fashion, and even if there was, KCMSD does not compete in it.

We have said on numerous occasions, particularly in school desegregation cases, we give great deference to the factual findings of the district court, and reverse only if clearly erroneous, under the standards set forth in *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985). The litigation before us dates back to 1977, with Judge Clark presiding over the case during the entire period. We traced this history in *Jenkins v. Missouri*, 807 F.2d 657, 661-62 (8th Cir. 1986) (*Jenkins I*), *cert. denied*, 484 U.S. 816 (1987), and on numerous occasions since that time we have updated the long chronology. Contrary to the State's arguments, there was substantial evidence that the District actively recruits and competes for teachers on a nationwide basis. In 1991 and 1992 KCMSD representatives traveled to New Mexico, North Carolina, Texas, Florida, Wisconsin, Arizona, Colorado, Michi-

gan, New Jersey, Ohio, and New York to recruit qualified teachers. In addition, they advertise in numerous journals on a nationwide basis. Both Superintendent Marks and AFT witness Gould testified about the difficulty in recruiting teachers to work in urban school districts.

The evidence introduced was sufficient to support the district court's findings that there was a national urban market. Even the testimony offered by the State tended to confirm this fact. The State's witnesses, though they stated they knew of no national market, conceded that their own school districts did at least some nationwide recruiting.

The record provides abundant support for the district court's finding and only ambiguous evidence detracting from it. This record in no way inspires a "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. at 573. Therefore, we may not disturb the district court's finding.

III.

Finally, the State argues that the court abused its discretion in approving the salary increases even if pay raises for some KCMSD employees are permissible. The State contends that the district court abused its discretion when it did not properly assess the results based on evaluative criteria the court had approved earlier, that the expert testimony provided by AFT and KCMSD failed to show that the salary increases had a positive effect on the quality of the KCMSD staff, and that the court had no basis for its finding that the non-teacher personnel were entitled to salary increases. The district court first found that because the salary increases are a necessary component of the desegregation program, the court only needed to determine the extent to which a raise would be appropriate. The district court then conducted a detailed analysis of the proposals submitted by the three

parties. Our analysis of the district court's careful factfinding demonstrates that it did not abuse its discretion.

In its proposal to the district court, the State argued that only certain of the instructional personnel should receive a one percent plus $400 increase for fiscal year 1994. The State, in essence, asked the court to freeze salaries at fiscal year 1993 levels for the other teachers and the rest of the personnel in the KCMSD. The State has failed to give, either to the district court or to us in this appeal, any clear basis for differentiating between that group of teachers who would be entitled to a raise and those who would not. The district court rejected the State's proposal, stating that the State had failed to submit a serious proposal and that the State's plan was "not consistent with the meaningful implementation of the desegregation program." Order of June 30, 1993 at 4. Viewing the State's proposals as "little or no benefit" to crafting a desegregation remedy, the court pointed to the legislature's failure to pass legislation which would enable the KCMSD to fund its share of desegregation expenses. *Id.* at 4-5. The district court then carefully weighed the proposals made by the AFT and KCMSD, and concluded that because resources were not available to fund the AFT plan, the court could not implement AFT's suggestions. *Id.* at 5. The court also referred to its earlier adoption of a less expensive proposal with respect to the Long Range Magnet Plan as evidence that the cost savings there would be used to the benefit of the desegregation program and help facilitate KCMSD's ability to fund salary increases. *Id.* at 8. We have observed in numerous orders appealed to us that the district court has juridically pruned applications of funding that have been presented to it. We are convinced that the district court's detailed analysis demonstrates a careful exercise of discretion and prevents any conclusion that it abused this discretion.

The State also argues that the district court abused its discretion in not considering the evaluative criteria the court had earlier

endorsed and approved, and that the salary increase has not changed the basic pattern of hiring or departures in the District. In a sense, the essence of the State's argument is that the district court should have accepted the testimony of its witnesses in this respect, a proposition we have on two occasions in this long litigation rejected. *See Jenkins v. Missouri*, 942 F.2d 487, 490-91 (8th Cir. 1991), and *Jenkins v. Missouri*, 965 F.2d 654, 657 (8th Cir. 1992). It is enough to say that the district court recognized and rejected these specific arguments in its June 1992 order. Order of June 25, 1992 at 9-11, 15. In the order before us, the court clearly stated that it declined to make a different ruling on substantially unchanged evidence. Order of June 30, 1993 at 2. It is evident that the district court had before it substantial evidence of a statistically significant reduction in the turnover rates for full-time employees, a dramatic increase in the percentage of certified employees selecting KCMSD because of the salary increases, and a significant decline in the number of employees lost to other districts. Further, the court heard testimony that the average performance evaluation for the professional employees increased positively and significantly.

The State also disputes the two percent per year pay increase the court granted to certain non-teacher personnel, and 2.5 percent per year pay increase to the remaining group, including maintenance workers, cooks and the like. We have already discussed the court's finding that salary increases for KCMSD's personnel were essential to comply with the court's desegregation order. Order of June 25, 1992 at 15. To improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators, and staff. *Id.* In the June 1993 order, the district court reiterated that the salaries of KCMSD personnel are appropriately considered a desegregation expense. Order of June 30, 1993 at 2. It made specific findings with respect to the two percent per year increase for administrators and non-represented employees, and with

respect to the operating, warehouse, maintenance, mail room and food service employees, and stated that the evidence reaffirmed that support personnel are critical to the successful implementation of the desegregation program. *Id.* at 12. These findings are not shown to be clearly erroneous, and are a sufficient basis to support the court's finding with respect to salary increases for those personnel, and accordingly, the district court did not abuse its discretion in ordering these increases.

We believe that the court did not abuse its discretion in the June 1993 order. It is evident that in considering the salary proposal now before us, the district court carefully analyzed the positions of the three parties, threaded its way through conflicting evidence, made findings of fact, and accepted the proposals it considered the best for the desegregation remedy of KCMSD. In addition, the district court has not hesitated to reject requests for funding that it determined were not appropriate. Finally, as we have observed in our latest opinion, the district court has requested submissions for funding proposals based on alternative phaseout periods of three, five, seven, or ten years. Thus, all of its careful analysis leads to the inescapable conclusion that the court is completely aware of not only the full scope but also the particular details in the desegregation remedy, and that it is anticipating the day when it may declare certain portions of the program unitary. The district court did not abuse its discretion in the June 1993 order.

We affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2238
No. 91-3636

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Plaintiffs,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Roseann Bentley; Dan L. Blackwell; Gary M. Cunningham; Raymond McCallister, Jr.; Susan D. Finke; Thomas R. Davis; Cynthia B. Thompson, Members of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri,
Defendants-Appellants,

School District of Kansas City, Missouri
Claude C. Perkins, Superintendent thereof,
Defendants-Appellees.

No. 92-3194
No. 92-3200

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Intervenor-Appellee,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook,

Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education,

Defendants-Appellants,

School District of Kansas City
Walter L. Marks, Superintendent thereof,

Defendants-Appellees.

No. 93-3274

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

American Federation of Teachers, Local 691,

Intervenor-Appellee,

v.

State of Missouri; Mel Carnahan, Governor of the State of Missouri; Bob Holden, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member

of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education,

Defendants-Appellants,

School District of Kansas City
Walter L. Marks, Superintendent thereof,

Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Missouri

Filed: February 24, 1994

ORDER

The petition for rehearing by the panel is denied. The panel of its own motion substitutes pages 17 and 20 attached hereto for the respective pages in the original opinion filed November 29, 1993.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

[Page 17]

> with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance.

Id. at 1446 (emphasis added).

In order to analyze this case under *Freeman v. Pitts* to determine if KCMSD has achieved unitary status, we must consider the constitutional injury, the methods selected to remedy that injury, the goals of the remedy, and the success achieved by the remedy in eliminating the vestiges of the constitutional violations to the extent practicable.

Of course, the injury is that vestiges remain of the dual school system once required by the State of Missouri. Those vestiges take the form of reduced student achievement and white flight, resulting in the anomaly of a racially isolated school district in the midst of a population with a far different racial makeup. In *Jenkins II*, we quoted the district court's findings:

> "[W]itnesses confirmed the conclusion reached by the Supreme Court in *Brown I* [*Brown v. Board of Educ.*, 347 U.S. 483 (1954)] that forced segregation ruins attitudes and is inherently unequal .... The general attitude of inferiority among blacks produces low achievement which ultimately limits employment opportunities and causes poverty.""Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD."

...

> The district court found that segregation in KCMSD caused the departure of the whites in the system to private schools and to the suburbs. During the years between *Brown I* and trial, the enrollment of KCMSD shifted from predominantly white to predominantly black. In the 1958-

[Page 20]

KCMSD argues that the State's evidence is insufficient to justify exercise of the court's discretion to grant unitary status under *Freeman*. KCMSD's argument has much merit, but the State asks only that we hold the district court abused its discretion in continuing the education programs.

We have considered the State's arguments in considerable detail, and we are satisfied that Judge Clark's comments during the four-day hearing show that he fully considered the State's *Freeman* arguments. In his order, he rejected funding for some of the programs, while granting the funds for others; thus, he implicitly rejected the State's *Freeman* arguments. While it might have been desirable for the court to articulate explicitly even a conclusory rejection of the State's *Freeman* arguments, the district court did not abuse its discretion in continuing the quality education programs.

In view of the State's arguments that under *Freeman* it is entitled to a determination on an incremental basis that KCMSD has become unitary, a few further words are appropriate.[10] *Dowell* and *Freeman* both outline in considerable detail the nature of the inquiry the district court must undertake in considering this issue. These principles must be applied in analyzing

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[10] Another part of the remedy we have stressed repeatedly is the development of a voluntary inter-district plan. We observe once again that the only implementation of any such plan is the ten student exchange with the Missouri City schools.

the question of unitariness, and in determining the success of the remedy in eliminating the vestiges of the constitutional violations found to exist in KCMSD to the extent practicable. Our earlier opinions which we have discussed above, particularly *Jenkins II* and the district court orders there in issue, set forth in detail the constitutional violations and the impact upon the District. It goes without saying that careful factfinding and detailed articulation of findings will be required, particularly with respect to whether vestiges of discrimination

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-2238

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

American Federation of Teachers, Local 691,

Plaintiffs,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Roseann Bentley; Dan L. Blackwell; Gary M. Cunningham; Raymond McCallister, Jr.; Susan D. Finke; Thomas R. Davis; Cynthia B. Thompson, Members of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri,

Defendants-Appellants,

School District of Kansas City, Missouri
Claude C. Perkins, Superintendent thereof,
Defendants-Appellees.

No. 91-3636

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Intervenor-Appellee,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Roseann Bentley, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Member of the Missouri State Board of Education; Susan D. Finke, Member of the Missouri State Board of Education; Thomas R. Davis, presiding President, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M. Williams,

Member of the Missouri State Board of Education;
Jacquelline Wellington, Member of the Missouri State Board of Education,
Defendants-Appellants,

School District of Kansas City, Missouri;
Walter L. Marks, Superintendent thereof,
Defendants-Appellees.

No. 92-3194
No. 92-3200

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellees,

American Federation of Teachers, Local 691,
Intervenor-Appellee,

v.

State of Missouri; John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member

of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education,

Defendants-Appellants,

School District of Kansas City
Walter L. Marks, Superintendent thereof,

Defendants-Appellees.

No. 93-3274

Kalima Jenkins, by her next friend Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

American Federation of Teachers, Local 691,

Intervenor-Appellee,

v.

State of Missouri; Mel Carnahan, Governor of the State of Missouri; Bob Holden, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, Vice-President, Member of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman, Commissioner of Education of the State of Missouri; Gary D. Cunningham, President, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education,

Defendants-Appellants,

School District of Kansas City
Walter L. Marks, Superintendent thereof,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Missouri

Filed: March 15, 1994

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, Circuit Judge, JOHN R. GIBSON,* Senior Circuit Judge, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

ORDER

The suggestion for rehearing en banc is denied. Judges Bowman, Wollman, Beam, Loken, and Morris Sheppard Arnold would grant the suggestion.

JOHN R. GIBSON, Senior Circuit Judge, concurring in the denial of rehearing en banc, joined by McMILLIAN and MAGILL, Circuit Judges.

The dissent to the denial for rehearing en banc would now rehear the ninth decision of this court dealing with the intradistrict remedy for the constitutional violations in the Kansas City, Missouri School District. Its willingness to do so is based on a misperception of the issues in this case and a highly selective reading of the record before the district court.

The dissent accepts, at least in part, the State's argument that the district court adopted a student achievement goal, measured by test scores, as the only basis for determining whether past discrimination has been remedied. The dissent develops this argument at length by examining the testimony of several witnesses. Certainly, Dr. Marks and Dr. Rainwater referred to student achievement test results, but their testimony covered a far broader spectrum. When we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered. Test scores, however, must be only one factor in the equation. Nothing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's

* The Honorable John R. Gibson was an active judge of this court when the suggestion for rehearing en banc was filed and took senior status on January 1, 1994, before this order was filed.

claim that its obligation for the quality education programs should be ended by a declaration they are unitary.

The Kansas City school desegregation litigation does not deal with "pedagogical sociology," *see* dissent, slip op. at 16, but rather the remedy for the constitutional violations and injuries, uncontested if not admitted, that we summarized in *Jenkins v. Missouri*, 949 F.2d 1052, 1057 (8th Cir. 1991) (*Jenkins VII*):

> The ultimate issue in this case, as it has been over the years, is remedying serious and pervasive constitutional violations. [*Jenkins v. Missouri*] *Jenkins II*, 855 F.2d [1295] at 1300 (quoting *Jenkins v. Missouri*, 593 F. Supp. 1485, 1492 (W.D. Mo. 1984) ("the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District") and *Jenkins v. Missouri*, 639 F. Supp. 19, 24 (W.D. Mo. 1985) ("Segregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD"). . . .

Few of the school desegregation cases have attempted to remedy as difficult an injury as "a system wide reduction in student achievement" caused by discrimination against black students. A quality of education program was part of the desegregation plan in DeKalb County, Georgia, which was before the Supreme Court in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). Justice Kennedy there referred to the "more ineffable category of quality of education." *Id*. at 1441. The district court's treatment of comparative test results in *Freeman* and its holding that the district had not achieved unitary status with respect to quality of education programs was noted by the Supreme Court, *id.* at 1441-42, and the parties did not challenge this part of the order. *Id.* at 1446. Thus, the *Milliken II*[1] quality education components of the district court's decree remain in effect.

[1] *Milliken v. Bradley*, 433 U.S. 267 (1977).

While the dissent argues that no particular level of education is guaranteed by the Constitution, the Constitution does require, as articulated again in *Freeman*, that the vestiges of discrimination be eliminated to the extent practicable. *See* 112 S. Ct. at 1448. Applying this test to the system wide reduction in student achievement, of a widespread and long-standing nature, is the task to which the district court addressed itself.

The dissent demolishes a strawman of a one-hundred year remedy. These words were those of the State's lawyer in a leading question, with which Dr. Rainwater agreed. The district court nowhere mentions this exchange. To the contrary, as the panel recognized, the district court called for submission of alternative plans phasing out court-ordered funding in three, five, seven or ten years. The dissent raises numerous other issues that should be answered, but reference to the panel's opinion is sufficient for this purpose.

We have in our earlier decisions observed that "[t]he choice of remedies to redress racial discrimination is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *Jenkins v. Missouri* (*Jenkins II*), 855 F.2d 1295, 1299 (8th Cir. 1989) (quoting *United States v. Paradise*, 480 U.S. 149 (1987), *aff'd in part and rev'd in part*, 495 U.S. 33 (1990). The significance of the district court's analysis is underscored by *Freeman*, 112 S. Ct. at 1445-46, which discussed the district court's discretion to order an incremental withdrawal.

The reasons advanced by the dissent do not justify rehearing en banc.

BEAM, Circuit Judge, dissenting from the denial of rehearing en banc, joined by BOWMAN, WOLLMAN, LOKEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

The court, with a vote of six nays and five yeas, denies en banc consideration of orders of the district court dealing, in part, with

court ordered pay raises for employees of the Kansas City, Missouri School District (KCMSD) and with the partial unitary status of the school district. I dissent.

I.

The de jure racial segregation of the KCMSD has been before the same United States District Judge for the Western District of Missouri since 1977. In that year, "the KCMSD implemented a desegregation plan," which reassigned African-American (minority) and European-American (majority) students within the district and which was designed to effect "a minimum of 30% minority enrollment . . . in every KCMSD school." *Jenkins v. Missouri*, 639 F. Supp. 19, 35 (W.D. Mo. 1985). Minority students from schools with a large minority enrollment were moved to schools with a large majority enrollment and vice versa. School boundary lines were changed, attendance zones created and more than 16,000 KCMSD students had their school assignments changed. *Id.* at 35-36. In 1979-1980, the United States Office of Civil Rights classified the KCMSD as being "in compliance" with federal requirements of school desegregation under Title VI of the Civil Rights Act of 1964. *Id.* at 36.

Between 1977 and 1985 the KCMSD majority enrollment decreased by more than forty-four percent while minority enrollment decreased by only thirty percent. *Id.* By 1985, nineteen of the fifty elementary schools in the KCMSD had enrollments of ninety percent or more minority students. *Id.* Tax collections were on the decline and school financing plans were failing at the ballot box. "White flight" to private schools and to the suburbs was rampant.

The district court, correctly recognizing that at least part of this problem was the consequence of the de jure segregation previously practiced under Missouri constitutional and statutory law, fashioned a remedial plan for the desegregation of the KCMSD and for "the elimination of all vestiges of state imposed

segregation." *Id.* at 23. This laudable goal was in accordance with the requirements of *Green v. County School Board*, 391 U.S. 430 (1968). "The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." *Id.* at 436. School boards were charged in *Green* with taking all necessary steps to convert to unitary systems in which racial discrimination would be eliminated "root and branch." *Id.* at 438.

Although the district court deemed the KCMSD and the state liable for the results of past racial discrimination, the court found that the suburban school districts (SSDs) surrounding Kansas City were not guilty of constitutional wrongs requiring them to participate in a court imposed remedy. This holding was affirmed by this court, en banc, in *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (*Jenkins I*), *cert. denied*, 486 U.S. 816 (1987). The nonliability of the SSDs presented at least one obvious remedial problem; specifically, the minority students in the KCMSD could not be intermixed by court order with the majority students in the suburbs. With this restriction in mind, the district court fashioned an aggressive and far reaching remedial plan binding only on the KCMSD. Some observers have described it as the most ambitious and expensive remedial program in the history of school desegregation.

The district court concluded that segregation had caused, among other things, "a systemwide *reduction* in student achievement." *Jenkins*, 639 F. Supp. at 24 (emphasis in original). This reduction in achievement, together with the deterioration in physical facilities, health concerns, safety concerns, comfort concerns and inadequate funding of all educational activities, had, at least in part, caused the "white flight" noted earlier. Thus, the district court imposed a remedy broadly designed (1) to attract majority students to KCMSD schools in order to provide minority students with a multiracial educational experience and (2) to provide a high-quality educational program, whether or

not a significantly desegregated school population was ever achieved.

A general outline of the remedy, affirmed with some modifications by this court, is as follows:[2]

> (1) A court imposed taxation plan on the citizens of Kansas City, Missouri, for school purposes.
>
> (2) Joint and several liability between the state and the KCMSD that required the state to provide substantial remedial funds including fund shares otherwise imposed upon the KCMSD for which no local monies were immediately available.
>
> (3) A system of magnet schools with educational themes designed to attract majority students away from the suburbs and the private schools to which they had fled and to expand the educational opportunities for all students.
>
> (4) An educational program aimed at "results more in keeping with national norms," *Jenkins*, 639 F. Supp. at 24, with reading skills at such national norms to be achieved within four or five years. *Id.* The educational program was to include:
>
> > (a) An annual evaluation rating of AAA, the highest classification awarded by the Missouri State Department of Elementary and Secondary Education, for all KCMSD schools. (All SSDs were and presently are AAA rated. At the time of the remedial order, the KCMSD was rated AA)
> >
> > (b) Reduction of class sizes to levels below those required for the AAA rating.

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[2] Specific details of the remedial plan are set forth in *Jenkins v. State of Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985) and our in en banc opinion in *Jenkins I*, 807 F.2d 657 (8th Cir. 1986).

(c) Extensive library improvements through improved media and library resources and through the hiring of at least twenty-two new librarians, thirteen of whom are certified for elementary schools.

(d) A system-wide computer education program with state-of-the-art automation equipment and highly skilled instructors.

(e) A reduced teaching load for all teachers and an improved curriculum with "additional art, physical education and music programs with specialty teachers.

(f) Additional school counselors to begin service at the elementary level and to reduce the workload of existing counselors at the secondary level to one full time counselor for each 390 students or fraction thereof.

(g) A summer school program providing remedial and developmental learning experiences, reinforcement and enrichment instruction and a "desegregative learning experience." *Id.* at 31.

(h) A full day kindergarten program in all elementary schools in the district.

(i) An extended day program including before and after school tutoring.

(j) An extensive early childhood development program.

(5) An "effective schools" program designed to accomplish changes in the KCMSD from the "bottom up." This program involves money for special programs developed by staff, parents, patrons, administrators, principals, teachers and students. *Id.* at 33.

(6) Staff development through special training in the principles and goals of the desegregation plan, implementation of effective instructional programs, effective information transmission, imposition of equitable discipline, solving transportation problems, use of school and community resources, and the law applicable to school desegregation.

(7) A mandatory student reassignment study costing not over $175,000.

(8) A voluntary interdistrict (KCMSD and SSD) transfer program.

(9) District-wide capital improvements.

(10) A separate desegregation plan administration.

(11) A desegregation monitoring committee.

(12) A new salary schedule designed to enhance the pay of all teachers and administrators and to aid in the recruitment and retention of staff at all levels and areas of responsibility.

The plan, very broadly outlined above, was implemented for the 1985-1986 school year. It has been ongoing and evolving since that time.

For the eight school years under the remedy, 1985-1986 through 1992-1993, the total KCMSD/state expenditures *for the desegregation plan alone* has been in excess of $902,473,047 and is escalating.[3] The KCMSD also apparently spends approxi-

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[3] The state contends in its petition for rehearing en banc that the cost to date specifically attributable to the desegregation remedy has been in excess of $1.2 billion dollars of which more than $250,000,000 has been spent to develop and maintain the educational programs. Petition for Rehearing at 5. This overall cost figure may be correct although I cannot tell from the

(Footnote 3 continued on next page)

mately two additional local, state or federal dollars on its school system beyond each dollar spent for the desegregation plan.[4] The annual per capita costs of the KCMSD far exceed those of the SSDs. I have compared the per-pupil cost for the year 1991-1992 (the only year readily available to me) for the KCMSD and for each SSD. With capital costs included, the per-pupil costs in the SSDs ranged from a low of $4,192 to a high of $7,488. KCMSD costs per pupil, by comparison, were $13,500. The SSDs operating costs (excluding capital costs) fell between $2,854 and $5,956 per student. The KCMSD spent $9,412 per student. With this for background, I turn to the present dispute.

II.

The state now seeks en banc consideration of parts of four orders of the district court and objects, specifically, to two facets of the district court rulings: (1) an order of June 30, 1993, granting additional salary increases to all employees of the

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(Footnote 3 continued)

evidence reasonably available to me at this time. The $250,000,000 program cost estimate is clearly low if it is intended to include all expenses except those connected with capital improvements. My estimate is derived from management audits in the annual reports of the desegregation monitoring committee that contain desegregation plan costs for the school years 1985-1986 through 1989-1990 and from recent figures the parties supplied to the panel that include expenditures for the school years 1990-1991 through 1992-1993. There may be additional state and federal desegregation dollars being spent outside the framework of the court-imposed plan. For the eight years for which audits and other figures are reasonably available, at least 902,473,047 total desegregation dollars have been spent as of July 31, 1993, of which at least $405,463,357 has been spent on capital improvements.

[4]My conclusion in this regard is, admittedly, based on limited information. In 1991-1992, the total KCMSD expenditure per pupil per year, including capital costs, was $13,500. The same year there were 36,349 students in the system. The 1991-1992 desegregation plan cost was $159,948,057.09 and the total school operation cost ($13,500 x 36,349 students) was $490,711,500.

KCMSD and (2) the district court's denial of partial unitary status of the KCMSD through the order of June 17, 1992.

A.

The state contends, and I agree, that federal court orders in school desegregation cases must directly address the constitutional violation. *Milliken v. Bradley*, 433 U.S. 267, 281-82 (1977) (*Milliken II*). An examination of the record supports the state's contention that further blanket wage increases will not directly enhance the educational program of the KCMSD. It should be noted that since 1985-1986, the court plan has required a competitive, if not generous, pay scale in the KCMSD. Thus, in my view, the current effort by the KCMSD and the American Federation of Teachers (AFT), aided by the plaintiffs, to bypass the collective bargaining process is uncalled for and is probably not an exercise reasonably related to the constitutional violations found by the court in 1985. Further, it enables the KCMSD to involve the state, via the joint and several liability holdings of the court, in pay raises the KCMSD probably could not impose upon its constituents. The court's salary order also enables the teachers' union to achieve goals that would be unattainable under the bargaining process.

Even so, I am willing to give the district court, and the panel, the benefit of the doubt with regard to wage increases for teaching and direct educational support personnel. The salary order affirmed by the panel, however, goes well beyond pay increases for these groups of KCMSD employees. I agree with the state that logic does not directly relate the pay of parking lot attendants, trash haulers and food handlers, for instance, to any facet or phase of the desegregation plan or to the constitutional violations. In my view, the panel was wrong in affirming this portion of the salary order.

B.

In early 1992, the KCMSD presented to the district court its proposed budget for year VIII of the desegregation plan. The state, in response, lodged numerous budgetary objections and contended that, under the holding in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), the KCMSD had achieved partial unitary status in the "high-quality educational program" (the *Milliken II* programs) prong of the remedial order. The district court conducted an evidentiary hearing on both the state's budget complaints and its partial unitary status contention on May 27-28, 1992. On June 17, 1992, the district court entered an order approving a year VIII budget and directing the KCMSD to submit a "Long Range Magnet Plan." Order of June 17, 1992. The court made no findings on the unitary status of the KCMSD and the state appealed the court's failure to address the issue.

Whether the KCMSD has actually achieved partial unitary status in the quality of its educational program imposed by the desegregation plan is, perhaps, still an open question on the record before us today. Even so, the standard adopted by the district court and by the panel to evaluate this question misreads *Freeman* and creates a hurdle to the withdrawal of judicial intervention from public education that has no support in the law. The district court has, with the approbation of the panel, imbedded a student achievement goal measured by annual standardized tests into its test of whether the KCMSD has built a high-quality educational system sufficient to remedy past discrimination. The Constitution requires no such standard.

Although the district court has not yet visited the unitary status question with the diligence it deserves, three orders subsequent to the June 17, 1992, order enlightened the panel regarding the court's analysis. First, on April 16, 1993, after additional hearings and ten months after the contested order, the court approved, in part, additional funding for magnet schools and directed the

KCMSD to submit further financing proposals. As part of this order, the court found that while the educational opportunities afforded in the magnet schools are better than those previously available and the magnet school plan has successfully gained the interest of a substantial pool of majority students in attending KCMSD schools, the KCMSD cannot be declared partially unitary because academic achievement is still at or below national norms for many grade levels. Order of April 16, 1993, at 9-13. Second, on June 30, 1993, after a hearing held on June 1-3, 1993, the district court entered the contested salary order. Finally, insofar as the petition for rehearing is concerned, the court entered an order on July 30, 1993, which states in part: "[t]he Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time." Order of July 30, 1993, at 4. A July 7, 1993, hearing predated this order.

In affirming the district court's June 17, 1992, implied denial of partial unitary status, the panel refers to evidence received at the May 1992 hearing as well as to a statement on the goal of the desegregation remedy made by the district court during that hearing. In this regard, the district court said: "'[t]he [c]ourt's goal was to integrate the Kansas City, Missouri, School District . . . and all these [*Milliken II*] matters were elements to be used to try to integrate the [KCMSD] . . . . That's the goal. And a high standard of quality education.'" *Jenkins v. Missouri*, 11 F.3d 755, 761 (8th Cir. 1993) (quoting the district court).

My examination of the record reveals no evidence directly relevant to the issue of unitary status other than that adduced at the May 1992 hearing. The panel, however, in responding to the state's contention that the district court erred, as a matter of law, in failing to rule on the *Freeman* issue in the June 17, 1992, order, relies on conclusory and fact finding portions of the April 16, 1993, order and, of course, on the district court's specific ruling on July 30, 1993. The meager record on appeal that the panel was forced to assemble from these disjointed parts only complicated the panel's attempt to engage in its own *Freeman* analysis.

When the district court referred to academic achievement "below national norms" in its April 16, 1993, order, the information came directly from the May 27, 1992, testimony of Arthur Rainwater, Associate Superintendent for Instruction of the KCMSD, given during the hearing on the Year VIII budget plan and the state's request for partial unitary status. The data before the court showed that at the beginning of the seventh year of the remedy, comparing similar tests administered at each grade level K through 12, in the same month of the year in 1985 and 1991, individual student achievement in the KCMSD remained below the "national norm," at grades 4 and up, except in one subject in one grade. Joint Appendix A, Vol. VII at 1495. Achievement also remained under the national norm in some subjects in the earlier grades. *Id.*

So, indeed, the district court was justified in finding that academic improvement in the seven years since the program began had been less than dramatic. It is this April 16 finding of fact that the panel appears to find sufficient to affirm the denial of partial unitary status. But, student achievement does not set the constitutional standard for determining partial unitary status.

The appellees, in their response to the state's petition for rehearing, contend that the panel did not rely on a student achievement standard in affirming the district court. The words "achievement test results" or even "test results," so say the appellees, "are nowhere to be found in the panel decision" Response at 7. This argument, in my view, is disingenuous. The panel affirmed the district court. The district court obviously relied upon test scores below the national norm as the basis for its ruling. The district court, by its own statement, "[h]as gone to great lengths to provide the KCMSD with facilities and opportunities *not available* anywhere else in the country." Order of July 30, 1993, at 6 (emphasis added). And, as noted by the panel, the district court has adopted a goal that includes the "integrat[ion of] the Kansas City, Missouri School District . . . *[a]nd a high*

standard of quality education." *Jenkins*, 11 F.3d at 761 (citing the district court's comments at the May 1992 hearing). The only factor the district court saw standing in the way of unitary status for the educational program was continued below average academic performance. Indeed, there is no other evidence in the record to support a conclusion that the educational enhancement (*Milliken II*) program of the KCMSD is wanting. Let's examine the facts.

Dr. Terrance Stewart of the Missouri Department of Elementary and Secondary Education has been directly involved in the development and implementation of the KCMSD remedy since September of 1984. He testified without dispute at the May 1992 hearing that the KCMSD was awarded the AAA rating in the 1987-1988 school year and since that time has "maintained and greatly exceeded AAA requirements." Joint Appendix A, Vol. V at 1008. Keeping in mind the fact that at the commencement of the remedial plan, school quality equal to that of the SSDs was a major goal, Dr. Stewart testified that "Kansas City School District [now] exceeds what's available in all the suburban school districts in almost every area of classification that we looked at." *Id.* at 1012. The state then, through Dr. Stewart, discussed each of the *Milliken II* programs ordered by the district court in 1985, including, but not limited to magnet schools, reduced class size, improved library and computer programs, lower pupil-teacher ratios, full day kindergarten, extended day school, summer school, early childhood education and capital improvements. In every instance, the enhancement of resources and program improvements ordered by the district court had been implemented and were in place no later than the 1988-1989 school year. Most of them predated that school year. Joint Appendix A, Vol. V at 995-1048.

Dr. Walter Marks, Superintendent of the KCMSD, also testified with regard to "appropriate buildings . . . equipping th[e] buildings with proper teaching equipment, furniture and every-

thing that goes into a building." Joint Appendix A, Vol. IV at 560. According to Dr. Marks, progress "has been fast, it has been pretty comprehensive; and in my judgment it has been well done." *Id.* However, Dr. Marks testified that the desegregation plan will not be fully implemented until "every school [in] ... the District [has reached] the national norm, the 50th percentile" in student achievement as measured by the testing process. *Id.* at 615.

Finally, Arthur Rainwater testified at length on the specific successes and failures in student achievement. He concluded that the purpose of the remedial plan "was to achieve desegregation and to change the levels of achievement in th[e] District." He further testified:

> Q. Is it your contention that until those desegregation and achievement levels are met that the remedial plan must continue?
>
> A. Yes. That would be my understanding.
>
> Q. Regardless of how many years it would take?
>
> A. Regardless of how many years it would take.
>
> Q. Even 100 years?
>
> A. Regardless of how many years.

Id. at 701. *Id.* at 159.

Regardless of whether the panel used the exact words "achievement test results" or "test results" it is abundantly clear that the panel felt that student achievement, or lack thereof, was the watermark up to which the tide of desegregation effort must flow. The panel said: "[t]he success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation." *Jenkins*, 11 F.3d at 766. The only measurement found anywhere

in the evidentiary record is the "achievement test results" which the district court refers to in the order of April 16, 1993. Thus, the state is correct in contending that the panel applied an achievement test standard.

There is no question that the reduced educational attainment discerned by the district court in 1984 resulted from acts of racial discrimination and represented "vestiges" of past unlawful segregation. The plan for a high-quality educational program was designed to: (1) attract nonminority students to the KCMSD system, (2) provide all KCMSD students with current and ongoing educational experiences equal to those available in the suburban school districts and (3) reverse the "reduction" in student achievement brought on by segregation and, in this way, remove the vestiges of past racial discrimination. I do not question these goals. The appropriate question now is, have some or all of the goals been met when the proper test is applied?

Education, generally, is not among the rights afforded explicit protection under the Constitution. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). And, although the Constitution forbids schools from operating in a racially discriminatory fashion, *Swann v. Charlotte-Mecklenburg Board of Education* disclaims any right to "any particular degree of racial balance or mixing." 402 U.S. 1, 24 (1971). Thus, by analogy, it seems clear that a victim of discrimination is guaranteed an equal opportunity in a high-quality educational program, but not a specific level of educational achievement under any set of conditions.[5]

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[5] Although the magnet schools and several other innovative programs are part of the enhanced educational system in the KCMSD and are part of the calculus which must now be considered in deciding unitary status in this case, I do not agree that the novel and expensive undertakings in Kansas City are a necessary part of a constitutionally sufficient effort, even one designed to eradicate the vestiges of discrimination. While *Milliken II* validated compensatory and remedial programs designed to, over time, free a public school

(Footnote 5 continued on next page)

To require achievement test scores at or above the national norm is to require the school system to be responsible for circumstances beyond its control. Segregated housing patterns, poverty, street violence, drug usage, criminal activities and lack of parental involvement, if they exist in the KCMSD, are not the responsibility of the public school system.

For example, in Omaha, Nebraska, a city in which the school district has now been declared unitary after a period of operation under a court enforced remedial program, a gap in mathematic achievement between minority and majority eighth graders has been discovered. At a recent meeting on the problem, Mary Dean Harvey, Director of the Nebraska Department of Social Services stated: "If any plan to close the mathematics proficiency gap [in Omaha] is to succeed, . . . it must address the fact that many of the 15,000 babies who will be born in the Omaha area this year will be born out of wedlock to teen-age mothers." Harold W. Andersen, "Fundamental Lesson in Math Proficiency," Omaha World-Herald, Feb. 13, 1994, at 19-A.

(Footnote 5 continued)

system from the effects of de jure racial segregation, something much less than the present Kansas City program would clearly pass constitutional muster. *See Freeman*, 112 S. Ct. at 1448 ("[t]he vestiges of segregation . . . must be so real that they have a causal link to the de jure violation being remedied"); *Milliken II*, 433 U.S. at 282 (remedial programs tailored to cure the educational problems created by the constitutional violation); *see also Swann*, 402 U.S. at 24. Indeed, at the outset, the stated remedial goal was to provide schools of equal quality with those found in the average SSD in order to restore the victims of unconstitutional segregation "'to the position they would have occupied absent such conduct.'" *Jenkins II*, 855 F.2d at 1301 (quoting district court Order of June 16, 1986). Whether the goal was reached was to be measured by the AAA rating. The evidence clearly establishes that this goal has long since been greatly exceeded and can now be easily maintained without many of the present activities. The magnet schools, for instance, as the nomenclature implies, were primarily designed to draw students back to the KCMSD and, thus, to address the desegregation, as opposed to the compensatory and remedial, prong of the plan.

I recognize that I am citing material outside the record. But, whether or not Ms. Harvey is correct or was correctly quoted and whether or not her concerns have direct applications to minority and majority students in the KCMSD, she makes the valid point that school systems have no control over many conditions that directly affect the educational test results of students in public schools. Thus, such a "test results" standard goes well beyond practicality and the requirements of the Constitution.

Freeman, relied upon heavily by the panel, is not to the contrary. The quality of education issue in *Freeman* was introduced by agreement of the parties and the district court considered the point in connection with its findings on resource allocation. *Freeman*, 112 S. Ct. at 1446. The Supreme Court did not have the opportunity in *Freeman* to consider whether quality of education is one of the factors that must be free from racial discrimination before a school district can be declared partially unitary. *See id.* at 1443; *Green*, 391 U.S. at 435. The panel's declaration that "implementation of programs in and of itself is not sufficient" to prove unitary status without rising test scores finds no support in *Freeman*. *Jenkins*, 11 F.3d at 765.

In fact, the panel seeks to turn *Freeman* on its head. Although the *Freeman* district court concerned itself with scores made on the Iowa Test for Basic Skills (ITBS) and the Scholastic Aptitude Test (SAT), the minority students in *Freeman* did very well on the standardized tests. *Freeman*, 112 S. Ct. at 1441. The *Freeman* district court found, nonetheless, that specific "quality of education programs" concerning teacher qualifications, library books and other educational resources were not yet fully in place. It was lack of educational opportunity, not the results of test scores, that motivated the district court decision in *Freeman*.

In this case, KCMSD students have in place a system that offers more educational opportunity than anywhere in America. The district court stated in its April 16, 1993, order, however, that it was "not satisfied that the District has reached anywhere close

to its maximum potential because the District is still at or below national norms at many grade levels." Order of April 16, 1993, at 11. The question is "whether the vestiges of past discrimination ha[ve] been eliminated *to the extent practicable*." *Board of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (emphasis added). The words "to the extent practicable" have been lost in the shuffle. In our quest to eliminate the vestiges of de jure segregation, we should not forget that:

> [r]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system. . . . It is the duty of the State and its subdivisions to ensure that [the effects of de jure segregation] do not shape or control the policies of its school systems. Where control lies, so too does responsibility.

Freeman, 112 S. Ct. at 1445. I suggest that court supervision of a desegregation remedy for 100 years, as suggested by Associate Superintendent Rainwater, is neither practicable nor desirable.

After the opinion in *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988) (*Jenkins II*), the full court denied en banc consideration Judge Bowman, joined by Judge Wollman, dissented from the denial stating:

> This is a case of exceptional importance. The remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order — the large number of magnet schools and the quantity of capital renovations and new construction — are concededly without parallel in any other school district in the country. Similarly, in no other case has federal judicial power been used to impose a tax increase in order to provide funding for a desegregation remedy.

> In addition, the case presents the over-arching question of whether these court-ordered programs and court-ordered taxes are Constitutionally required in order to rectify the vestigial effects of legally mandated segregation (dead now for over thirty years) or instead represent an unsupportable exercise of judicial power in a legislative-style attempt to solve social problems that have their origins in other causes.
>
> In over five years on the bench, I have not seen a case more deserving than this one of thoughtful consideration by the entire Court. The decision as it stands appears to arrogate to the federal judiciary vast powers that under the Tenth Amendment are reserved to the states or to the people. I therefore regret that a majority of the Court has voted to deny the petition for rehearing en banc.

Jenkins II, 855 F.2d at 1318-19. In retrospect, I regret that I did not join the dissent at that time. In my view, this case, as it now proceeds, involves an exercise in pedagogical sociology, not constitutional adjudication.

III.

Even with the observations I make today, I am not prepared, at least without further briefing and oral argument before the court en banc, to decide that the KCMSD is unitary in the area of equal opportunity to a quality education. I am prepared to say, however, that when faced with the state's request the district court, and the panel, embraced a measure, standardized test results, not required or permitted by the Constitution.

If the state's claim carries with it the unstated idea that having put the elements of a quality educational program in place it may now take its money and exit, stage left, leaving the KCMSD to finish the scene alone, I believe that partial unitary status is not at hand. But, if an equal opportunity to receive a quality education is now permanently available to each student in the KCMSD,

and is thus available to erase, if the opportunity is reasonably pursued, the vestiges of past discrimination, then unitary status has been reached and control should be relinquished by the federal courts to the state and local governments.

At a minimum, this court should consider, en banc, what issues are open and unanswered, except through faulty analysis, and remand the matter to the district court for further proceedings. *See Freeman*, 112 S. Ct. at 1450. If the evidence shows that the state and the KCMSD have an affirmative commitment to continue to provide a nondiscriminatory, quality educational program in Kansas City, unitary status should be declared, regardless of what the test scores show.

Thus, I dissent from the order denying the suggestion for rehearing en banc.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: June 17, 1992]

Before the Court is the KCMSD's Year VIII Desegregation Plan. The parties have stipulated to budgets for certain components and the Court heard evidence regarding the remaining disputed components on May 27-28, 1992. The Year VIII Desegregation Budget will be approved as set forth below.

The parties have stipulated to the following components and budgets:

	Stipulated Year VIII Budget	KCMSD Obligation
AAA	6,138,490	2,703,822
Reduced Class Size	16,988,240	16,988,240
Full Day Kindergarten	1,880,137	470,034
Summer School	2,334,374	583,595
Early Childhood Education	4,451,351	1,112,038
Interest Expense	593,500	593,500
Maintenance	4,233,527	4,233,527
	36,619,619	26,684,756

The parties dispute budgets for the following components:

Extended Day, Effective Schools, 1986-87 Magnets, District Communications, Security, Special Education Compliance and High School Prep. In addition plaintiffs have requested an Eight Period Day at Westport High School, Playground Equipment for Faxon Montessori and Team Travel/Tournament Entrance Fees for Central High School.

Extended Day—The KCMSD proposes a budget of $453,000 to continue the extended day programs at Border Star, James, Greenwood, Rock Creek West, Scarritt and Askew. The State objects that this program is not attracting non-minority students to the District's traditional schools. However, the KCMSD states that the program is an important factor in the decision of parents who chose these schools, particularly non-minority parents. The KCMSD also states that the program is having a significant impact on academic achievement.

Effective Schools—The KCMSD proposes a budget of $7,250,000 to continue the effective schools program. The KCMSD has restructured the program to focus on instruction and school climate, as well as competitive grants based on school success. The State objects that the effective schools program has not been successful in improving student achievement through planning and implementation at the school level.

The KCMSD admits that the program has resulted in mixed success. The KCMSD maintains that raw test score results when compared only with test score objectives do not adequately reflect improvements in achievement. Also, several school principals testified that their programs would suffer drastically without effective schools funding. The Court will continue funding for Year VIII.

1986-87 Magnets—The KCMSD proposes a budget of $8,001,410 to fund the 1986-87 Magnets. During 1991 the

District initiated discussions with the State and the DMC Budget Subcommittee on the desirability of providing Year VIII budgets in a manner that would more clearly depict the desegregation contributions of major activities funded by the Court. The Year VIII Magnet base budget reflects transfers of appropriate positions to other budgets. Also the 1992-93 proposal delineates base and theme costs. This Court agrees with the KCMSD that these programs should remain viable with desegregation funding for Year VIII.

District Communications—The KCMSD proposes a budget of $31,125 to publish a District newspaper ten times during the 1992-93 school year. The State objects that this component should be taken over by the District and placed in its operating budget. However, the newsletter is directly related to attracting non-minority suburban students into the KCMSD.

Security—The KCMSD proposes a budget of $1,897,037 for security. The KCMSD requests the addition of two clericals, two dispatchers, two patrol officers and an assistant to the Safety Manager. The KCMSD also requests overtime funding for approved desegregation budgets and the addition of five security vehicles. While this Court continues to believe that the primary responsibility for KCMSD security rests with the Kansas City Missouri Police Department, evidence at the hearing suggests that the KCPD is understaffed. Robert Livingston testified that personnel at the KCPD has not increased even though there has been a 300% increase in calls. Mr. Livingston concluded that the KCPD could not provide any additional help at this time.

There was substantial evidence regarding the number of calls and incidents at District schools, as well as the need for documentation and reports. The KCMSD clearly demonstrated the need for the additional security positions. The Court disagrees with the State's position that adding security makes schools less desegregatively attractive. Instead, increased security should

add to the attractiveness of a school which may be perceived as unsafe.

The Court notes that the budget for the addition of security vehicles should be calculated as $65,000 with the trade-in value of the replaced vehicles to be included in the $65,000 budget cap.

Special Education Compliance—The KCMSD proposes a budget of $990,044 for Special Education Compliance. The KCMSD suggests that the desegregation program has brought unique burdens to the KCMSD's efforts to maintain compliance with State and Federal guidelines for providing equal educational opportunities. The State argues that this request goes beyond the parameters of a desegregation remedy. This is an issue of State and Federal compliance with which each school district in the State must comply. The Court will deny desegregation funds for Special Education Compliance because the KCMSD has not shown that the desegregation program actually has presented a greater burden to maintain special education compliance.

High School Prep—The KCMSD proposes a budget of $323,145 for continuation of the High School Prep program which the KCMSD initiated in 1991-92 and has funded out of its operating budget. The KCMSD maintains that the High School Prep program is a desegregation component because the District needs to improve the achievement levels within the system in order to attract non-minorities outside of the system.

The High School Prep program focuses on significantly overaged middle school students who have been retained in a grade for two or more years. The voluntary program is designed to reduce the drop-out rate among high-risk students. The KCMSD states that the program makes a critical contribution to the overall success of the desegregation remedy by providing an opportunity to accelerate the educational progress of over-age students who are immediately at risk of leaving the educational

system. The program allows the student to re-enter the system at an age-appropriate level, substantially increasing the likelihood that the student will continue his education and graduate. The KCMSD notes that the program has been immensely popular.

While the Court agrees that this program is vital to the KCMSD and should be continued, the Court cannot justify the use of desegregation funds to help remedy a nationwide problem which the KCMSD has not specifically shown to be a vestige of segregation.

Eight Period Day at Westport High School—Plaintiffs request a budget of $262,500 for the addition of an eight period day at Westport High School. Plaintiffs state that without an extra period students at Westport will not be able to take all of the required core curriculum courses and also be able to take two or three courses which would provide a more intense exposure to theme studies.

Playground Equipment at Faxon Montessori—Plaintiffs request a budget of $22,500 for playground equipment at the Faxon Elementary Montessori Magnet School. The original planning budget did not provide for the purchase of any playground equipment. Plaintiffs submit that this is a problem at a Montessori school with its popular early childhood program for three and four year old children.

Team Travel/Tournament Entrance Fees for Central High School—Plaintiffs request a budget of $45,000 for travel and tournament costs. The evidence at the hearing demonstrated that athletes in programs such as fencing and weightlifting have been so successful that the teams must travel substantial distances in order to find comparably skilled teams for meaningful competition. Steve Butler, one of the fencing coaches at Central High School, stated that the fencing team at Central High School is beginning to receive national as well as international attention. There is no doubt but that the success and notoriety of the athletic

programs at Central High School will contribute to the desegregative attractiveness of the Classical Greek theme

This Court will approve the following Year VIII budgets in addition to those components already stipulated to by the parties.

	Proposed Year VIII Budget	KCMSD Obligation
Extended Day	453,000	113,250
Effective Schools	7,250,000	1,812,500
1986-87 Magnets	8,001,410	3,745,050
District Comm.	31,125	7,781
Security	1,897,037	739,844
Playground Eqpt.	22,500	5,625
CHS Team/Travel	45,000	11,250
Westport Ext. Day	262,500	65,625
	17,962,572	6,500,925

Also before the Court is the State's motion to require the KCMSD to submit its proposal for a long-term extension of the LRMP in lieu of a proposal for a one-year extension. The KCMSD filed a motion for approval of the LRMP extension. Both parties filed responses and presented oral arguments on the issue on May 29, 1992. This Court will require the KCMSD's LRMP proposal to be filed on or before September 1, 1992. It is important for students, patrons, parties and the Court to know which programs are effective and which programs should be changed or terminated.

Accordingly, it is hereby

ORDERED that the Year VIII Desegregation Budget is as follows:

	Desegregation Budget	KCMSD Obligation
AAA	6,138,490	2,703,822
Reduced Class Size	16,988,240	16,988,240
Full Day Kindergarten	1,880,137	470,034
Summer School	2,334,374	583,595
Early Childhood Education	4,451,351	1,112,038
Interest Expense	593,500	593,500
Maintenance	4,233,527	4,233,527
	36,619,619	26,684,756
Extended Day	453,000	113,250
Effective Schools	7,250,000	1,812,500
1986-87 Magnets	8,001,410	3,745,050
District Comm.	31,125	7,781
Security	1,897,037	739,844
Playground Eqpt.	22,500	5,625
CHS Team/Travel	45,000	11,250
Westport Ext. Day	262,500	65,625
	17,962,572	6,500,925
Total Desegregation Budget	54,592,191	33,185,681

and it is further

ORDERED that the KCMSD submit its Long Range Magnet Plan on or before September 1, 1992.

/s/ Russell G. Clark
RUSSELL G. CLARK
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: June _____, 1992

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: June 25, 1992]

Before the Court is the AFT's proposal for desegregation funding for teacher salary increases for fiscal years 1992-93 through 1994-95. The KCMSD filed a separate salary proposal for 1992-93. The State filed a response to both proposals. The parties filed subsequent replies and responses to the proposals. The Court set this matter for a hearing on June 9-12, 1992 and will approve a teacher salary package as set forth below.

At the end of the current fiscal year, desegregation funding for both the 1987 teacher salary package and the 1990 salary increase settlement will expire. If desegregation funding for salaries is not extended, teacher salaries will roll back to 1986-87 levels. The AFT has proposed a salary increase to keep the KCMSD competitive with the national urban market. The KCMSD has proposed to maintain salaries at their current levels with moderate equity adjustments. The State has proposed that this Court roll back teacher salaries to their 1986-87 levels because the salary increases have not met the goals set by the Court.

AFT SALARY PROPOSAL

The AFT's salary proposal requests that continued and increased desegregation funding of teacher salaries is necessary in order to assure equitable and effective implementation of the desegregation plan. The AFT proposes to raise salaries to levels that are competitive with the national urban market. Specifically, the AFT requests that the Court establish teacher salary schedules for the next three years at a level at least equal to the projected national urban average teacher salaries. The AFT also suggests that the KCMSD redirect under-expended resources out of other desegregation programs and into the budget for teacher salaries.

The AFT and the KCMSD assert that the most relevant market for setting teacher salaries in the KCMSD is the national urban school market. The AFT and KCMSD suggest that urban districts throughout the country provide a more meaningful comparison with the KCMSD in terms of size of budget, enrollment, employees, inner-city working conditions, minority/non-minority enrollment patterns, socio-economic levels and special needs of urban versus suburban student bodies. The surrounding local suburban school districts do not provide this same type of useful comparison.

The AFT asserts that setting salaries that are competitive with the national urban market is necessary so that the District can retain and attract high quality teachers. The AFT stresses that high quality teachers are essential to successful implementation of the desegregation plan. The AFT proposes that current KCMSD teacher salaries be restructured and increased so that the District will be comparable to or higher than average salaries paid in urban school districts throughout the United States.

The State disagrees that the national urban market is the most relevant market for purposes of comparison. The State of Missouri argues that the relevant labor market for teachers in the

KCMSD is the "regional market." The "regional market" is defined as Missouri and the eight states contiguous to Missouri: Kansas, Nebraska, Iowa, Illinois, Kentucky, Tennessee, Arkansas, and Oklahoma. The State's view is based on the origin of actual hires.

Recruitment efforts by the KCMSD indicate that the District recruits on a national level and the pool of certified applicants indicate that the District competes at a national level. After the 1990 salary order, 20.9 percent of the applicants were from Missouri, 23.2 percent of the applicants were from the eight contiguous states, 35.3 percent of the applicants were from other States and 20.7 percent of the applicants were from unknown origin. *See* AFT Ex. 28. This Court does not accept the State's contention that in order to find that the District competes in the national urban market, the District must show that it actually hires a substantial number of teachers or personnel from the national urban market. Also, Kansas City, Missouri is a part of the national urban market and other national urban cities are competing for Kansas City's teachers and staff. Therefore the Court agrees with the AFT and KCMSD that the national urban market is the most relevant market for purposes of comparing salaries in the KCMSD.

The AFT recommends that the best measure of the national urban market for teachers is the Department of Defense ("DOD") salary schedule which is based upon the average salaries of all urban school systems in cities of 100,000 or more population in the United States. Each year the DOD compiles a database of teacher salaries paid in approximately 170 urban school districts in the United States.

The AFT presented evidence that teacher salaries in the District lag significantly below the national urban average. According to the most recent statistics, teacher salaries in the national urban market have increased approximately 6.71% each

year in the last eighteen years. In terms of the dollar differences, the gap between KCMSD teacher salaries and the national urban average today is close to the gap that existed in 1986-87, before any desegregation funding for salaries was provided by the Court. *See* AFT Proposal at 21.

Thus, in the current 1991-92 school year, the gap between KCMSD teacher salaries and the actual and projected urban average salaries is considerable and will worsen unless significant salary increases are authorized and funded. For example, KCMSD salaries for beginning teachers in the B.A. and M.A. salary lanes are currently below the national urban average by approximately 4%. *See* AFT Ex. 14. At the top end of the B.A. and M.A. lanes the KCMSD's most experienced teachers are currently earning, respectively, about 19% and 14% less than the national urban average. *See* AFT Ex. 14. The AFT cautions that if teachers are paid at the same level in 1992-93, the KCMSD's ability to compete in the marketplace for teaching talent will be diminished even more severely.

Moreover, if the current salary increase orders are allowed to expire on June 30, 1992, teacher salaries for the 1992-93 school year will fall from a starting salary of $22,215 to just over $17,000. The net result of a roll back would be that the KCMSD would be forced to compete in the national urban market for beginning teachers at a 40-45% disadvantage. *See* AFT Ex. 31. The AFT warns that if current salaries are allowed to expire, salaries will revert to a level which will result in intolerable consequences for the desegregation plan. Such a roll back would place the KCMSD teacher salary schedule thousands of dollars behind any comparable school district and would devastate the District's ability to attract and retain teachers. The AFT fears that a roll back would essentially paralyze the District's ability to recruit and retain quality teachers who are vital to the desegregation program.

Art Rainwater, Associate Superintendent for Instruction, testified that a roll back would cause a number of teachers to defect to other markets and would definitely hurt the desegregation program. A salary decrease of this proportion could cause a mass exodus of District employees. Those teachers who could not leave the system would likely suffer from internal morale problems which might be passed on to the schoolchildren. A salary roll back would inevitably affect the attitudes of teachers who stayed in the District.

The AFT's proposal would remedy other inequities in the current KCMSD salary schedule. In the current KCMSD teacher salary schedule there are a number of non-uniform salary steps. For example, when a teacher in the B.A. salary lane moves from step to step, he or she normally receives a raise of $778.00. However, when moving from step four to step five in the B.A. lane, the teacher receives a raise of $888.00. When moving from step five to step six the teacher gets a raise of $667.00. There has been no explanation for these arbitrary differences between steps.

The AFT also urges that adoption of the DOD national urban market teacher salary schedule would permit the KCMSD to reform its current salary schedule by adding step increases for years of experience or "longevity" steps. Longevity steps are found in most urban salary schedules. The AFT proposes that the Court remedy disparities at the top end of the salary schedule by adding longevity steps. Longevity steps would account for additional salary shortfalls as compared to the national urban average.

Another problem with the absence of step increases in the KCMSD salary schedule is that there are salary inequities among similarly-situated teachers. Teachers within the District have been frozen at their current levels for two years. For example, a teacher who began her teaching career in the KCMSD and has

taught for ten years would be paid at step nine instead of step eleven. However, a teacher who taught for ten years in another school before being hired to teach in the KCMSD this year would be paid at step eleven. A two-step differential could result in a pay scale difference of $1,444 to $2,443 per year. Testimony at the hearing indicated that these types of inequities cause morale problems within the District and lead to internal dissatisfaction with the system. In turn, this leads to ineffective implementation of the desegregation program.

In summary, the AFT requests that this Court adopt the national urban average as the relevant market in which the KCMSD competes for teachers, administrators and staff. The AFT proposes to raise salaries, eliminate step inequalities and add step increases for teachers. The AFT also proposes to raise salaries of all categories of classified personnel: paraprofessionals, administrators, professionals, technical, clerical, security, nurses, food service, operating, building managers, cafeteria managers, information systems, miscellaneous schedule five employees, part-time workers, operating, maintenance, and parent educators.

The AFT urges this Court to order funding that will allow teachers to earn their regular hourly rate of pay for participating in workshops and inservice training outside of their regular work schedule. The AFT disagrees with the KCMSD that if current salary levels are maintained for 1992-93, the salaries will be roughly competitive with the national urban market. Finally, the AFT foresees particularly drastic consequences if salaries are rolled back to their 1986-87 levels.

KCMSD SALARY PROPOSAL

Due to the dire fiscal constraints currently facing the District, the KCMSD submitted a one-year proposal instead of supporting the AFT's three-year proposal. The KCMSD believes that the salary increases proposed by the AFT are larger than the

District can responsibly propose at this time. The KCMSD teacher salary proposal requests that this Court maintain current salaries and provide for minor equity adjustments for those positions which are paid substantially below relevant market rates.

The KCMSD proposes to maintain inservice programs for teachers in the 1990 salary package and continue inservice training for paraprofessionals. The District strongly believes that inservice training provides a valuable opportunity to develop theme-related expertise and to share teaching innovations which enhance the quality of curriculum offerings. The KCMSD's salary proposal would extend the work year for elementary principals by fifteen days to provide additional time for leadership and magnet theme training. In the past, many elementary principals have spent several uncompensated days addressing the needs of their schools. In addition, the KCMSD salary plan proposes to continue paying substitutes $75.00 per day, continue compensation for supervision of extra-curricular activities and maintain a reserve fund in the amount of $500,000.

The District's proposal offers a fiscally conservative, yet roughly competitive compensation plan for 1992-93. The KCMSD is confident that its proposal would enable District personnel to continue to attract and retain highly qualified personnel necessary to implement the desegregation plan.

STATE SALARY PROPOSAL

The State of Missouri responded to the salary proposals with a request that this Court discontinue desegregation funding for teacher salaries. The State asserts that its analysis of the effect of the 1990 salary increase demonstrates that the salary increase did not achieve its objectives. For instance, the State submits that the increase had virtually no effect on increasing the quality of new hires or decreasing the quality of staff who left the District. The State claims that the AFT and the KCMSD have virtually ignored the evaluative criteria approved by the Court.

The State concludes that the salary increases have had no demonstrable effect on improving the KCMSD's ability to implement the desegregation remedy and therefore the Court should allow salaries to roll back to the 1986-87 levels. The State suggests that continuation of salary increases would constitute an unauthorized upgrade of District operations under the guise of desegregation. The State submits that to the extent KCMSD resident taxpayers wish to support the school system, they should be given an opportunity to show that support by approving an operating levy increase sufficient to support the existing salary levels.

The State adds that quite apart from its position that increasing salaries is not desegregation related, the AFT has presented no evidence that the KCMSD is having any great difficulty recruiting nurses. The State maintains that health care for students is not related to the desegregation effort and that the school nurse issue is beyond the parameters of the resolution the DMC passed regarding the salary issue.

For that matter, the State maintains that all other categories of classified personnel for whom the AFT seeks salary increases are also non-instructional personnel, with the possible exception of paraprofessionals. The State argues that there is no data that the KCMSD is having difficulty attracting and retaining these personnel.

RESULTS OF THE SALARY INCREASES

Pursuant to this Court's previous orders, the KCMSD agreed to collect and report appropriate data regarding the results of the District's recruiting efforts and to implement reorganization of personnel recruiting efforts by adopting a personnel recruitment plan and schedule. The Court also approved the use of eighteen evaluative criteria as a means to assess the effects of the salary increases approved in the July 23, 1990 Order. The Court noted that the evaluative criteria, which were designed to identify

trends, should not be construed as setting "absolute numerical requirements or bright lines." *Id.* at 6.

The AFT, KCMSD and the State have interpreted the results of the data differently. The AFT and KCMSD contend that the data generally indicate that the salary increases assisted the KCMSD in becoming more attractive to higher quality personnel needed to implement the desegregation orders. The KCMSD emphasized that the results should be viewed in the context that the 1990 salary package did not provide a competitive salary advantage to the District but instead helped to alleviate a substantial and growing competitive disadvantage.

One issue of major contention was whether or not the salary increase had an effect on the District's ability to recruit and retain teachers. The District maintains that while salary may not be the sole factor in the KCMSD's recruiting and retention experience, no data are required to support the sound and logical conclusion that if salaries had lagged more than twenty percent below their current levels, it would have been considerably more difficult to attract and retain even nominally qualified and experienced personnel.

The KCMSD asserts that since the salary increase, more new hires have cited salary as their reason for selecting the KCMSD. *See* KCMSD Exs. 12, 14 and 15. However, the State's expert, Dr. Gold, asserts that the primary selection criteria for choosing to work at the KCMSD was "non-salary based." The District submits that this claim is not supported by the survey data which show that salary was identified as the number one reason newly hired certified personnel selected the KCMSD. *See* KCMSD Ex. 11. More newly hired classified, administrative and professional staff also identified salary as their reason for selecting KCMSD after the salary increase. *See* KCMSD Exs. 12 and 13.

The KCMSD argues that Dr. Gold's conclusion is a result of the manner in which he combined certain reasons for selecting

the KCMSD. The survey provides eight reasons for selecting the KCMSD: salary, family relocation, location, magnet plan, specific magnet program, benefits, KCMSD reputation and other. Dr. Gold combined "family relocation" with "location" and he combined "magnet plan" with "specific magnet program." He also separated "salary" and "benefits." Dr. Gold's results indicated that location and program-related interests are the primary selection criteria.

Regardless of whether salary is the primary reason for selecting the KCMSD, the results show that salary is a significant factor in the selection process. In light of the growing disparity between KCMSD salaries and salaries in the national urban market, it is no surprise that location and program-related interests are also significant factors which attract teachers to the KCMSD.

At the hearing, the State also presented evidence regarding the results of other data as applied to the eighteen evaluative criteria. The State's experts generally concluded that the salary increase did not produce statistically significant effects or trends. One aspect of the State's analysis used a "quality index" which combined years of experience, degree and most recent degree grade point average as a basis to determine the quality components included in some of the eighteen evaluative criteria.

The "quality index" was criticized for its limited value in measuring objective quality criteria. The AFT and the KCMSD emphasized that the index could not measure quality factors such as personality, charisma, motivation or enthusiasm. Nor did the quality index account for a teacher's entire undergraduate grade point average, the prestige of a particular university, other interests, honors or publications. Therefore, while the parties agreed that the quality index is comprised of important factors in determining the quality of a teacher, it is by no means representative of the whole spectrum of desirable teacher "qualities" that are considered in the hiring process.

The "quality index" does not necessarily demonstrate that the District was unsuccessful in hiring and retaining quality staff. Instead it may show that it is impossible to evaluate the true quality of teachers with three objective criteria. The quality index formula measures quantifiable factors of acknowledged relevance. Yet, these factors alone are an imperfect yardstick by which to measure the quality of thousands of individual teachers at the KCMSD.

The State concludes that the salary increase has not met the goals set by the Court and the salary increase should not be continued or expanded. The State insists that the lack of statistically significant trends in improvement signals the death knell for continued Court-ordered funding.

FUNDING PROPOSALS

Logic and empirical data show that in the absence of desegregation funding for salaries, the District will not be able to implement its desegregation plan. The AFT and KCMSD agree that the salary proposal adopted by the Court should be approved as a desegregation expense. The AFT requests that this Court impose joint and several liability with the State to pay 75% of the cost and the KCMSD to pay 25% of the cost. The AFT requests a three-year extension of the existing 96-cent property tax. The KCMSD urges the Court to approve its proposal as a desegregation expense with the State contributing 75% and the District contributing 25% . The KCMSD proposes to fund its share with a continuation of the 96-cent tax levy. The KCMSD's proposal would cost approximately $49.7 million and the AFT's proposal would add another $17.5 million for a total proposal of approximately $67.2 million.

The State claims that the Court should not approve desegregation funding for salaries because such funding would be beyond the scope of the Court's remedial authority. However, the Supreme Court has recently stated that "[t]he essence of a court's

equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action." *Freeman* v. *Pitts*, 112 S.Ct. 1430 (1992). It is well-settled that a district court may require the expenditure of funds to implement a desegregation remedy. *See Milliken* v. *Bradley*, 433 U.S. 267 (1977).

This Court and the Eighth Circuit have "made abundantly clear 'that the constitutional violations must be remedied and these remedies fully funded.'" *Jenkins* v. *Missouri*, 931 F.2d 470, 476 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 437 (1991). "[A] court is entitled to require money for programs that materially aid the success of the overall desegregation effort." *See Arthur* v. *Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983).

In 1989, this Court concluded that the KCMSD's difficulty in hiring and retaining qualified personnel adversely affected the desegregation plan. This Court previously expressed concern about the District's ability to implement the desegregation plan in light of its salary structure. July 5, 1989 Order at 23. In approving the 1990 salary package, this Court found that the salary increases for KCMSD personnel were "essential to comply with the Court's desegregation orders." July 23, 1990 Order at 6.

High quality personnel are necessary not only to implement specialized desegregation programs intended to "improve educational opportunities and reduce racial isolation" *Jenkins* v. *Missouri*, 855 F.2d 1295, 1301 (8th Cir. 1988), *aff'd in part, rev'd in part on other grounds*, 495 U.S. 33 (1990), but also to "ensure that there is no diminution in the quality of its regular academic program." *Jenkins* v. *Missouri*, 672 F. Supp. 400, 410 (Mo. 1987), *aff'd*, 855 F.2d 1295 (8th Cir. 1988).

The KCMSD asserts that funding of the 1992-93 salary package as a desegregation expense is premised on the Court's findings that the District has difficulties "hiring and retaining

qualified personnel" which, in turn, negatively affect implementation of the desegregation remedy. There is no question but that a salary roll back would have effects that would drastically impair implementation of the desegregation remedy.

1992-93 TEACHER SALARY PACKAGE

The Court will adopt the KCMSD's salary proposal to maintain salaries for the 1992-93 school year, provide moderate equity adjustments, add fifteen days to the school year for elementary principals, maintain inservice training, maintain substitute pay, maintain extracurricular pay rates and maintain a reserve fund. The Court will approve a joint and several funding allocation of 50%/50% between the State and the KCMSD.

The KCMSD salary proposal is as follows:

	PROPOSED	CURRENT AMOUNT ALLOCATED	ADDITIONAL FUNDS NEEDED
Maintain Current Teacher Salary Level for Teachers Currently Budgeted	35,016,077	33,417,873	1,598,204
Provide Current Teacher Salary Level For Teachers Projected For Year VIII	564,715	0	564,715
Maintain Current Salaries of Other Employees	10,654,870	9,166,659	1,488,211
Provide Equity Adjustments	1,102,388	0	1,102,388
Lengthen School Year for Elementary Principals	231,866	0	231,866
Maintain Inservice Days for New Teachers	261,746	213,638	48,108
Provide Five Days of Para-professional Inservice	220,688	220,688	0
Maintain Substitute Rate at $75 Per Day	621,130	450,000	171,130
Maintain Extra-Curricular Pay Rates	568,911	675,000	(106,089)
Reserve	500,000	656,142	(156,142)
TOTAL	49,742,391	44,800,000	4,942,391

The additional funds needed for current teacher salary levels are for the cost of two summer school sessions, current vacancies, lane changes and fringe benefit increases. The District also estimates that there will be approximately 53 new teacher positions. These figures could change based on actual enrollment. The budget for maintenance of current salaries for other employees is increased slightly to include vacancies, new positions, overtime costs and revised fringe benefits rates.

The internal equity study cost projections for 1992-93 are as follows:

Executive Secretaries	69,564
Secretary A's	479,176
Secretary B's	263,205
Clerks	216,179
Admin. Staff	44,498
Nurses	29.765
	1,102,388

The State declares that, with the proposition of a salary roll back, "[the State] is not so naive as to believe" that the Court will not consider "the discomfort of those whose salaries would be reduced." State Post-Hearing Brief at 34. However, the basis for this Court's ruling is grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD. In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators and staff.

The success of the prior salary orders has been described as "qualified." Yet, the Court agrees with the KCMSD and the AFT that the results must be viewed in the context of how KCMSD teacher salaries actually compared with the national urban aver-

age teacher salaries. The State argues that the AFT and the KCMSD have improperly focused on the effect of a roll back. However, this is a relevant consideration. The success of the desegregation program rests in great measure upon those charged with implementing the plan.

In light of the District's current financial crisis, this Court will maintain salaries at their current levels for the 1992-93 school year and continue the 96-cent levy increase for an additional year. At this time, the AFT's proposal is simply not economically feasible. However, this Court rejects the State's proposition that "to tie salaries for employees to an asserted national urban market would be a gross misuse of public funds." State Post-Hearing Brief at 5. Instead, the substantial increase sought by the AFT should be deferred.

The State's proposal would cause severe harm to the desegregation effort. It is critical to the success of the desegregation plan that the employees who carry it out are compensated at or near the relevant market rates of compensation so that the District can attract and retain employees with the training and experience necessary to implement the Court's plan. A salary roll back would result in excessive employee turnover, a decline in the quality and commitment of work and an inability of the KCMSD to achieve the objectives of the desegregation plan.

Accordingly, it is hereby

ORDERED the KCMSD's salary proposal for 1992-93 is approved as follows:

	PROPOSED	CURRENT AMOUNT ALLOCATED	ADDITIONAL FUNDS NEEDED
Maintain Current Teacher Salary Level for Teachers Currently Budgeted	35,016,077	33,417,873	1,598,204
Provide Current Teacher Salary Level For Teachers Projected For Year VIII	564,715	0	564,715
Maintain Current Salaries of Other Employees	10,654,870	9,166,659	1,488,211
Provide Equity Adjustments	1,102,388	0	1,102,388
Lengthen School Year for Elementary Principals	231,866	0	231,866
Maintain Inservice Days for New Teachers	261,746	213,638	48,108
Provide Five Days of Para-professional Inservice	220,688	220,688	0
Maintain Substitute Rate at $75 Per Day	621,130	450,000	171,130
Maintain Extra-Curricular Pay Rates	568,911	675,000	(106,089)
Reserve	500,000	656,142	(156,142)
TOTAL	49,742,391	44,800,000	4,942,391

and it is further

ORDERED that the KCMSD is authorized to maintain its property tax levy at a rate of $4.96 per $100 assessed valuation for the 1992-93 tax year; and it is further

ORDERED that funding for the 1992-93 salary package will be 50%/50% joint and several liability between the State and the KCMSD.

/s/ Russell G. Clark
RUSSELL G. CLARK
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: June ____, 1992

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: June 30, 1993]

This matter comes before the Court on the American Federation of Teachers, Local 691's ("AFT") motion for desegregation funding for certified and classified employee salary increases in Fiscal Years 1993-94 through 2002-3; AFT's motion for desegregation funding for operating, warehouse, maintenance, mailroom, and food service employee wage increases in fiscal years 1993-94 through 1995-96; the Kansas City Missouri School District's ("KCMSD") motion for desegregation funding of its salary proposal for 1993-94 through 1995-96; the State of Missouri's ("State") motion for an order expressly establishing the State's right of contribution; and the State's motion to strike the plaintiffs' pleading filed post-hearing or in the alternative for leave to file a response to said pleading. This matter has been the subject of extensive briefing by the parties. The State has responded by way of its consolidated response in opposition to AFT's and KCMSD's salary motions. The KCMSD and AFT have each replied to the State's memorandum in opposition to the motions. A hearing was held on June 1-3, 1993 and the Court received evidence on the issues presented in the above referenced pleadings. The plaintiffs filed a post-trial memorandum in support of desegregation funded salary increases for KCMSD employees. The State has filed a motion to strike plaintiffs' pleadings or in the alternative for leave to file a response. The Court, after reviewing the evidence presented at trial and after a thorough examination of the pleadings submitted by the parties, will grant the AFT's motion in part and deny it in part; grant the KCMSD's motion in part and deny it in part; deny the State's motion to strike; grant the State's motion for leave to file a response to plaintiffs' post-hearing memorandum; and defer ruling on the State's motion for an order establishing a right of contribution as set out herein.

The Court has previously addressed the issue of "law of the case" to the extent that it applies to the evidence presented herein. The Court announced to the parties at the trial of these issues that the "law of the case" doctrine applies only where the district court has decided an issue and that issue has been presented to and resolved by an appellate court. The same issues as those presented this year in the salary hearing were presented last year and are currently on appeal to the Eighth Circuit Court of Appeals. That being the case, the "law of the case" doctrine will not operate to bar the Court from considering the evidence and deciding the issues again this year. However, the Court is not inclined to make a different ruling where the evidence presented is substantially unchanged. The Court has reviewed the evidence in its entirety and finds that the evidence presented this year is strikingly similar to the evidence presented last year. Therefore, the Court will not change its rulings with respect to the issues contested by the State in this year's hearing. There is no basis to find that the KCMSD is no longer in the national urban market nor that salaries of KCMSD personnel are not appropriately considered to be a desegregation expense. The Court does have inherent authority to modify its remedy in this matter. It is the intention of the Court to modify the salary component of the desegregation remedy as set out below.

Due to the insignificant, if any, change in the evidence from last year to this year the Court will not elaborate on the evidence adduced at the trial on this issue. Rather, it is the Court's intention to fashion a salary order which is appropriate under the continued climate in the district. The one glaring problem made obvious by the testimony at this year's hearing is the absence of the step increases over the last three years. The inequality created by the missed step increases is a fundamental flaw in the compensation package in the KCMSD. It is the purpose of this Order to rectify the inequality and allow those missing steps to be recompensed. The proposal of the AFT was to reinstate the lost steps over a period of three years. While this proposal would reduce the initial outlay of funds, it would not immediately correct the inequality in the salary package. The Court also notes that the immediate adjustment for lost steps would lessen the long-run costs in the salary component, albeit by a relatively small amount. Therefore, the Court will order that the KCMSD make reparation to those individual employees currently employed by the district who have not been afforded step increases due to the structure of the salary package.

The next issue raised in this litigation was whether the KCMSD participated in the national urban market. The Court has previously held that the KCMSD did, in fact, compete in the national urban market for teachers. The State, again this year, sought to present evidence to the contrary. However, if anything, the State's expert witnesses supported the proposition that the District did compete in a national urban market. The Court finds no reason to alter its previous findings and would therefore reaffirm its finding that the KCMSD competes in the national urban market for teachers.

The Court has found that the underlying issues of whether the national urban market is correctly applied, whether the salary component is properly a desegregation expense, and whether salary increases have a positive impact on the desegregation

effort should be resolved again this year in the same manner as last. The Court, having found that the salary increases are a necessary component of the desegregation program, must now determine the extent to which a raise would be appropriate this year.

State's Plan

The State submitted to the Court a plan by which the KCMSD classroom teachers and other instructional personnel would receive a 1% increase of their base salary for FY1994 + $400. The Court, again, finds that the State has failed to bring to the Court a serious proposal for the issue currently pending. This proposal is reminiscent of "patch and paint" or "OBE in three schools in place of the magnet program". The State's proposal is simply not consistent with the meaningful implementation of the desegregation program. The State has argued repeatedly and currently on appeal that the salary component is not a valid component of the desegregation remedy. The State has every right to maintain its position. However, the State has the ability to offer a reasonable alternative while not jeopardizing its legal arguments currently on appeal. The proposals of the State have been of little or no benefit in the past and are of painfully little aid to the Court in this instance, as well. Therefore, it is left to the Court to craft a viable alternative given the constraints facing the district at this point in time.

The Court will note that the testimony at trial reflected that the Missouri Legislature has had five years to pass legislation which would enable the KCMSD to fund its share of the desegregation expenses. While the State has not passed such legislation, as of this date, the Legislature has inserted a line item in this fiscal year's budget to reflect the anticipated costs of a salary increase. The Court notes with approval the State's effort to maintain its fiscal responsibility in this area.

The Court has previously found that the AFT's proposal for 1992-93 was not economically feasible at the time but that the Court, if able, would provide for much of the salary increases proposed by the AFT. Additionally, the Court specifically rejected "the State's proposition that 'to tie salaries for employees to an asserted national market would be a gross misuse of public funds.'" (June 25, 1992 Order, at 16). Here again, the Court is compelled to consider the same alternatives. There is one major difference. The persons for whom raises are sought have foregone yet another year without salary adjustments.

AFT's Plan

The AFT has submitted a proposal for certified and classified personnel to receive additional compensation as per the following scenarios. First, it is suggested that the Court adopt the 1992-1993 DOD salary schedule in 1993-94. Additionally, the AFT suggested that the Court also include Longevity Steps and make up the lost steps which current teachers have previously foregone. The estimated costs of these respective alternatives were presented in AFT Exhibit 32 and are set out below:

ESTIMATED COST PROJECTIONS
AFT SALARY PACKAGE
1993-94 TO 1995-96

	Current Amount Allocated	1993-94 Proposed	1994-95 Proposed	1995-96 Proposed
Maintain proposed teacher salary for teachers currently budgeted	35,016,077	54,867,436	67,083,995	80,213,547
Maintain proposed salaries and work year of other employees	8,055,509	11,759,051	14,247,767	16,894,576
Provide proposed salary increases for additional employees	564,715	1,328,859	2,289,441	3,217,861
Maintain inservice days for new teachers	261,746	277,451	294,098	311,744
Maintain substitute rate at $75 per day	621,130	621,130	621,130	621,130
Maintain extra-curricular pay rates	568,911	568,911	568,911	568,911
Regular hourly rate for magnet inservice	0	2,394,576	2,573,532	2,765,862
Reserve	500,000	500,000	500,000	500,000
TOTAL	45,588,168	72,317,414	88,178,874	105,093,431

ANALYSIS OF AFT SALARY PROPOSAL

Proposal	1993-94 Estimated Cost	1994-95 Estimated Cost	1995-96 Estimated Cost
1992-93 DOD Implement in 1993-94 Includes all Lost Steps and Longevity	72,317,414	88,178,874	105,093,431
1992-93 DOD Implement in 1993-94 Includes all Lost Steps - No Longevity	68,308,205	83,798,440	100,325,951
1992-93 DOD Implement in 1993-94 No Lost Steps - No Longevity	63,642,828	78,726,048	94,827,515
Annual Incremental Costs:			
Cost to Make Up Lost Steps and Grant Longevity (1992-93 DOD in 1993-94)	8,674,586	9,452,826	10,265,916
Cost of Longevity Steps (1992-93 DOD in 1993-94)	4,009,209	4,380,434	4,767,480
Cost to Make Up Lost Steps (1992-93 DOD in 1993-94)	4,665,377	5,072,392	5,498,436

The Court must consider the fiscal realities in which the District is forced to operate. Also, the Court must consider the need to have successful implementation of the desegregation program. It has repeatedly been decided by this Court that the salaries at issue herein are a proper expense under the desegregation program. Therefore, the question, as correctly stated by the District, the AFT and the plaintiffs at the beginning of the trial on this issue, is not whether to give a raise to those included in these programs, but rather how much of an increase is appropriate.

The Court views the fiscal horizon as changing for the district. The Legislature has adopted a new educational funding package which appears to result in a substantial gain for the KCMSD in terms of a net increase in state non-desegregation funding. The Court has further noted that there has been some activity in the Legislature towards allowing the KCMSD some viable alternatives in financing its share of the desegregation expense. Moreover, the Legislature, anticipating the salary increase contemplated herein, included an increase in this year's budget item for salaries over last year's. Moreover, the Court in April of this year adopted a two-year extension of the LRMP with certain minor modifications. The Court adopted what was most certainly a less expensive plan than that offered by the KCMSD. It is expected that this cost savings would be used to the benefit of the desegregation program in general and specifically there should be some added ability of the District to fund its share of the salary increases. The Court finds that the fiscal climate in the District is changing for the better and that there is a substantial need to address the inequalities in teachers' salaries created in the past.

The Court finds that the area of foremost importance is the return to the teachers of lost step increases. As noted above, the Court believes that the best approach in this instance is to return the lost steps in year one (FY93-94). This will result in an inordinate increase in year one but in the long-run will be the least-cost approach. Therefore, the Court will order that the missed salary steps for current KCMSD teachers be restored in FY93-94.

The Court further finds that the teachers in the KCMSD have gone without a salary increase for long enough. It is essential to the success of the desegregation program that those persons charged with implementing the plan be the most qualified persons reasonably attainable. The Court has found that the KCMSD most assuredly competes in the national urban market. Therefore, it is appropriate for the Court to look to this market for guidance as to what the relevant teachers' salary should be. The DOD schedule provides an accurate representation of what the national urban market will bear in terms of teachers' salaries. The Court finds that the DOD schedule is the appropriate benchmark for the KCMSD to use in determining teachers' salaries. While the Court does find that the AFT's package would be of the greatest advantage to those represented, it is still not viable for the Court to implement at this time. However, as repeatedly announced herein, the Court does find that some increase is appropriate.

KCMSD Plan

The KCMSD has proposed for 1993-94 to set teachers salaries by reference to a teacher salary schedule prepared by the DOD for 1991-92. This would result in an approximately four percent increase in entry-level pay for KCMSD teachers with a bachelor's or a master's degree. All eligible teachers would again receive regular annual step increases. The KCMSD recognizes that its proposal is not designed to allow the KCMSD to immediately be competitive in the national urban market. Rather, the plan offered by the District calls for the District to be "roughly competitive". The Court expects that the District will one day be more than "roughly competitive", however, at this date the District has offered the most fiscally sound alternative. Therefore, the Court will adopt the District's proposal with the addition of the step increases as discussed above. The package offered by the District and approved by the Court is as follows:

ESTIMATED COST PROJECTIONS*
KCMSD SALARY PACKAGE
1993-94 TO 1995-96
(without step increases restored)

	Current Amount Allocated	1993-94 Proposed	1994-95 Proposed	1995-96 Proposed
Maintain proposed teacher salary for teachers currently budgeted	35,016,077	41,621,333	48,218,767	55,108,579
Maintain proposed salaries and work year of other employees	12,209,812	15,743,754	19,154,177	22,782,827
Provide proposed salary increases for additional employees	564,715	1,027,317	1,671,709	2,260,665
Maintain inservice days for new teachers	261,746	269,598	277,686	286,017
Maintain substitute rate at $75 per day	621,130	621,130	621,130	621,130
Maintain extra-curricular pay rates	568,911	568,911	568,911	568,911
Reserve	500,000	500,000	500,000	500,000
TOTAL	49,742,391	60,352,043	71,012,380	82,128,129

* This cost projection includes restoration of step increases but does not compensate for missed step increases and does not include certain longevity steps in the DOD teacher Salary schedule.

The Court will further order that the District's proposal for a 2% per year increase for administrators and non-represented employees, as well as for classified employees (other than those listed below) be adopted for FY93-94 through FY95-96. Next the Court is asked to consider the "group exit" program. The program offered by the District is of the type which the Court would generally support. The Court will approve the KCMSD's proposal to develop a "group exit" program but will reserve approval of any specific program until the District brings forth the completed version of any such program.

AFT Proposal for SEIU Local 12 Bargaining Unit

The Court will next address the AFT's motion for desegregation funding for operating, warehouse, maintenance, mailroom, and food service employee wage increases in FY93-94 through FY95-96. The evidence presented at trial reaffirmed the position that the support personnel of the district are critical to the successful implementation of the desegregation program. The AFT has put forth a proposal as follows:

	1993-94	1994-95 and 1995-96
Operating Dept.	4% Wage Increase + Step Increase	4% Annual Increases + Step Increases
Maintenance Dept.	10% Wage Increase + Equity Adjustments for Truck Driver and Warehouseperson	4% Annual Increases
Warehouse Dept.	Wage Increases Based on Those Given Identical Job Titles in Maint. Dept.	4% Annual Increases
Mailroom Dept.	Wage Increases Based on Those Given Same/Similar Job Titles in Maint. Dept.	4% Annual Increases
Food Services	6% Wage Increase + Elementary School Manager Equity Adjustment + Step Increases	4% Annual Increases + Step Increases

The Court has carefully considered the AFT's proposal with respect to the employees listed above. The District has proposed a 4% annual salary increase for maintenance workers without annual step increases through FY95-96. While the Court has consistently found that the support personnel form an integral component of the desegregation program, the Court is not convinced that the increases sought by the AFT or the District are sufficiently well supported to allow for such a large increase at this time. The Court finds, however, that some increase is appropriate. The Court finds that the appropriate amount of increase in the wage rate for these departments is 2.5% for each of the periods listed above, for a total of 7.5%. The Court will not direct that the District implement the step increases as urged by the AFT. Rather, the Court finds that this matter is better left to the bargaining between the parties.

The Court finds that it is important for the KCMSD to be able to continue to contribute to the salary expense incurred due to the desegregation program. Therefore, the Court will order that the KCMSD is authorized to maintain its property tax levy at a rate of $4.96 per $100 assessed valuation for the 1993-94, 1994-95, and 1995-96 school years. The funding for the salary package announced herein will be 50%/50% with joint and several liability between the State and the KCMSD.

State's Additional Motions

The State has filed a motion to strike the plaintiffs' post-hearing brief or in the alternative has requested leave to file a reply to plaintiffs' memorandum. The Court does not condone haphazard disregard for the time limits which are imposed by the Court, usually after protracted negotiation between the parties. Additionally, the Court notes to plaintiffs that a discussion with the judge's law clerk is in no way seeking leave of the Court to file a pleading out of time. The Court agrees that in the further pursuit of an equitable resolution of the matters herein it is

appropriate to have the position of the plaintiff schoolchildren before the Court. The position taken is of surprise to no one. The Court finds that no party is prejudiced by the filing out of time of plaintiffs' memorandum. However, in the interest of fairness the Court will grant the State's motion for leave to file a reply. The Court has considered each of the pleadings in making the decision announced herein.

Next, the State has moved the Court for an Order establishing an express right of contribution in the State. The Court has reviewed the briefs of the parties on this issue and finds them to be exemplary. It has come to the Court's attention that there may be further evidence adduced at the forthcoming hearing on this issue. Thus, the Court finds that it is appropriate to defer ruling on the issue of the State's right to contribution. The Court specifically finds that the issue for contribution with respect to the matters decided herein will be deferred pending the trial on the *Milliken II* issues on July 7, 1993.

In summary, the Court has found that the salary package presented by the District is the most economically feasible at this time. There, is no basis for the Court to change its previous rulings on the issues presented herein. It is the Court's intention that the lost-steps be recompensed in FY93-94. The Court will defer ruling on the State's motion for contribution but expressly reserves any ruling on the issue of contribution for the salary package adopted herein.

Accordingly, it is hereby

ORDERED that the KCMSD's salary proposal for 1993-94, 1994-95, and 1995-96 is approved as follows:

	Current Amount Allocated	1993-94 Proposed	1994-95 Proposed	1995-96 Proposed
Maintain proposed teacher salary for teachers currently budgeted	35,016,077	41,621,333	48,218,767	55,108,579
Maintain proposed salaries and work year of other employees	12,209,812	15,743,754	19,154,177	22,782,827
Provide proposed salary increases for additional employees	564,715	1,027,317	1,671,709	2,260,665
Maintain inservice days for new teachers	261,746	269,598	277,686	286,017
Maintain substitute rate at $75 per day	621,130	621,130	621,130	621,130
Maintain extra-curricular pay rates	568,911	568,911	568,911	568,911
Reserve	500,000	500,000	500,000	500,000
TOTAL	49,742,391	60,352,043	71,012,380	82,128,129

and it is further

ORDERED that the foregone salary step increases are ordered restored for FY93-94; and it is further

ORDERED that the Court approves funding for 2% annual wage increases in FY93-94 through FY95-96 for administrators and other non-represented employees as well as for classified personnel (other than those discussed herein); and it is further

ORDERED that the Court approves a 2.5% annual wage increase for each of those persons represented by the AFT'S motion for operating, warehouse, maintenance, mailroom, and food service departments for FY93-94, FY94-95, and FY95-96 for a total of 7.5%; and it is further

ORDERED that the District's request to develop a "group exit" program is granted; and it is further

ORDERED that the State's motion to strike plaintiffs' post-trial memorandum is denied; and it is further

ORDERED that the State's motion for leave to file a reply to plaintiffs' memorandum is granted; and it is further

ORDERED that the Court will defer ruling the State's motion for an order establishing an express right of contribution until after the July 7, 1993 hearing on *Milliken II* issues.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: June 30, 1993

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: July 30, 1993]

The Court has pending before it several motions regarding the desegregation programs in the KCMSD. The first matter is the joint motion of the KCMSD and plaintiffs for approval of next two years of *Milliken II* desegregation plan. Also before the Court is the motion of the KCMSD for approval of final FY92 costs for temporary relocation of students and programs ("Staging"). Lastly, the KCMSD has filed a motion to alter or amend the Court's Order of June 30, 1993 ("Salary Order").

The AFT has responded to the KCMSD's motion to alter or amend the Salary Order. Additionally, the State has responded to the motion as well. The Court has previously indicated to the parties through informal communications that it intended to issue an order clarifying the Salary Order and will do so in response to the KCMSD's motion to alter or amend. The Court will grant the KCMSD's motion in part and deny it in part.

With respect to the motion for approval of final FY92 staging costs, the parties have informally made known to the Court that there was no opposition to the District's motion. A response has

not been filed by any party. The Court having duly considered the merits of the KCMSD's motion for final FY92 staging costs will grant the KCMSD's motion as proposed.

The State has responded to the joint motion with respect to the *Milliken II* component of the desegregation program. A joint stipulation was filed in this matter resolving many of the components of the *Milliken II* program. On July 7, 1993, the Court held a hearing on the remaining disputed items in the joint proposal. Upon consideration of the evidence presented at the hearing and the arguments made by the parties in pleadings previously submitted, the Court will grant the joint motion in part and deny it in part in accordance with the following discussion.

MILLIKEN II

The remaining *Milliken II* components for which the State has alleged factual disputes are (1) inclusion of additional special education teachers in the Base Budgets; (2) use of the 1986-87 level for determination of the appropriate level of maintenance spending; (3) enhancements to the security program currently in effect; (4) extension of the Effective Schools program; (5) inclusion of the Full-Day Kindergarten program without offset for monies received as a result of S.B. 380. The State further argues that the Court should reject the joint motion *in toto* because the KCMSD has attained the sufficient levels of desegregation called for under *Freeman v. Pitts*, 112 S.Ct. 1430 (1992). Based on this argument the State urges the Court to deny any additional funding of *any* of the *Milliken II* components requested in the joint motion. Lastly, the State again calls for an order of the Court expressly establishing a right of contribution in the State for monies expended under the previous orders of the Court allowing for joint and several liability for desegregation expenses in the KCMSD.

The Court will first address the State's argument that the desegregation programs called for under the *Milliken II* compo-

nent have reached the necessary level of compliance with the desegregation decree in this case. The State offers the findings of the United States Supreme Court in *Freeman v. Pitts*, 112 S.Ct. 1430 (1992) in support of its arguments. In *Pitts* the Court held that where a district court's desegregation order has been substantively complied with in certain areas the court may withdraw desegregation supervision of those areas even though the program has not been fulfilled in its entirety. The Court has heard evidence presented by the State in several recent hearings offered to show that the desegregation program in the KCMSD has been a complete failure. In the LRMP renewal hearing held early in this year the State repeatedly argued that the District has failed to show sufficient signs of improvement as a result of the magnet program to justify continuation of that program. The State has repeatedly taken the position that the desegregation programs ordered by the Court have been of absolutely no benefit to the school children of the KCMSD.

It appears now that the State is arguing that all is cured. The State, as it has in the previous *Milliken II* hearings, has argued that the programs covered under this component have attained the necessary levels of desegregative effect and should therefore be turned over to the KCMSD for continued implementation. The Court has previously ruled as a result of the LRMP renewal process that the KCMSD has not met the goals and standards set by the Court in establishing the desegregation remedy. The *Milliken II* component is an integral part of the overall desegregation remedy and the Court finds that the State's arguments that these components have attained unitary status are unpersuasive. The State should not be heard to complain that the desegregation plan is a complete failure on the one hand and that the *Milliken II* components are completely successful on the other. The Court finds that the State has made fundamentally flawed arguments in pursuit of an order determining unitary status in the KCMSD. The Court does find that the *Milliken II* components have been partially successful in implementing the goals and standards of

the desegregation remedy. However, these components have not yet met these goals in their entirety. The Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time. Therefore, the Court will order the continued implementation and funding of the *Milliken II* components for which the joint stipulation was entered for two years.

The Court will next consider the individual programs with which factual issues have been raised regarding their further implementation as part of the *Milliken II* component of the desegregation remedy. The first issue is inclusion of additional special education teachers in the Base Budgets. The State opposes the additional special education teachers on the basis that this expense is incurred as a result of an accounting mistake on the part of the District and the State argues that it should not be made to bear this burden. The Court finds that the teachers at issue herein are necessary to meet the special needs of some students who choose to attend magnet programs. The fact that these positions have been the subject of a previous accounting error is irrelevant to the future consideration of desegregation expenses as a result of the need to provide these services. The Court finds that these positions are legitimate desegregation expenses and their inclusion in the Base Budgets is appropriate. Therefore, the Court will approve the requested addition to the Base Budget component.

Next, the Court will consider the use of the 1986-87 square footage level for determination of the appropriate level of maintenance spending. Mr. Robert Brogi, Deputy Superintendent, testified to the appropriate measurement of maintenance attributable to the desegregation program. In order to calculate this amount, Mr. Brogi compared the pre-remedy square footage to the post-remedy square footage and determined that the difference was the amount attributable to desegregation. He further testified that he believed that the maintenance in the KCMSD was getting better but there were some areas which

could use improvement. The Court has reviewed the maintenance component submitted as a part of the *Milliken II* program and finds that the Maintenance plan is an appropriate component to the overall desegregation remedy. It is imperative that the District be able to maintain the programs made available as a result of the desegregation remedy and the Court will do everything in its power to see that this goal is met. However, the concept of using the 1985-86 as the base year for attributing desegregation expenses presupposes that the KCMSD would never have incurred any growth in its physical plant over the time period contemplated. The Court does not have an exact method of determining the precise amount of square footage attributable to desegregation. However, it is the belief of the Court that the District should be responsible for some of the growth in the district and finds that the recommendation of the DMC to use August 1991 as the base year is the appropriate method for calculation. The Court will therefore order the extension of the maintenance component of the *Milliken II* component as proposed by the District with the modification that the base year for comparison be August 1991.

The Court will next consider the proposed enhancements to the security program offered by the District in the *Milliken II* proposal. Captain Livingston testified that the security of the KCMSD was a legitimate expense to be incurred by the desegregation program and that to fully implement the security plan it would need to be expanded as proposed. The Court concurs with Captain Livingston's assertion that the Security Component is a primary consideration in the implementation of the desegregation remedy. Moreover, the Court finds that the security of the school children and the staff of the schools is of utmost importance to the Court in fashioning the remedy in this case.

The Court does wish to express its concern over the submission of expenses for security as desegregation related expenses when there is no such relationship. These allegations were made

during the hearing, but not fully substantiated. The Court would suggest to the district that it use all due diligence in tracking such expenses and ensuring that there is no opportunity for misapplying already scarce resources. The Court will not look favorably on a return of such claims. The Court does not believe that it is imperative to have the additional officers as requested by the reorganization of the security department. While it is the Court's opinion that there is no question that the additional personnel would heighten security the Court does not believe that the changes, as proposed, are fiscally sound. Therefore, the Court will deny the request for additional staffing.

It is appropriate at this point for the Court to note that the City has a vested interest in the school system being rebuilt. The Court has gone to great lengths to provide the KCMSD with facilities and opportunities not available anywhere else in the country. The City must take some responsibility in maintaining these schools. The City receives the benefit of the attractiveness and acclaim of these schools. However, it appears to the Court that the City has shirked its responsibility in maintaining the school system being provided to it. It is entirely appropriate for the Police Department of Kansas City, Missouri to supply security to schools that are in need. The police in Kansas City have the responsibility of protecting its citizens and the many thousands of school children are just as deserving as any other citizen. The Court urges the District to approach the City and attempt to coordinate some provision of security by the police department whether it be in the form of sub-stations or some other alternative. It is incumbent on the City to be responsible for *all* of its citizens.

The Security proposal included the request for additional vehicles. Captain Livingston testified that should the request for additional personnel be denied that there would be no need for additional vehicles. The Court, having found that the additional personnel will not be provided, further finds that the request for

additional vehicles will also be denied. The KCMSD has proposed the addition of walk-thru metal detectors for purposes of security. The Court finds that the climate of activity in the KCMSD is such that this is a reasonable expense. The Court will therefore grant the request for walk-thru metal detectors. The Court will extend the Security component of the *Milliken II* program for a concurrent two-year time period with the other components but the Court will deny the requested additions to the Security component with the exception of the walk-thru metal detectors.

The Court will next consider the proposed extension of the Effective Schools program. The State has taken the position that the District failed to present any evidence for evaluation of the Effective Schools program and that the motion for extension of that component should therefore be denied. The District and plaintiffs argue that there exists no evidence of success or failure as the data has not been available for evaluation. The data will be available at the end of the 1993-94 school year to measure the impact of the Effective Schools program. The plaintiffs further argue that the Court, in its previous order, adopted the Effective Schools program for two years but funded it for only one. The plaintiffs argue that it was implicit in the Court's previous order that it would extend funding for the second year even though it would be impossible to evaluate the program as the data would not yet be available. The Court finds that the Effective Schools program should be extended for one additional year per its previous order. The District is directed to continue to collect data to evaluate the impact of the Effective Schools program. The Court, in considering the appropriateness of a further extension of the Effective Schools program at the end of FY93-94, will expect that the District be able to submit a detailed analysis of the impact of this program for the Court's review at that time. The Court will therefore grant the District's motion for extension of the Effective Schools component and appropriate funding for FY93-94.

The Court will next consider whether the inclusion of the Full-Day Kindergarten program without offset for monies received as a result of S.B. 380 is an appropriate component of the *Milliken II* program. The Court has previously found that the Full-Day Kindergarten was a benefit to the desegregation effort in the KCMSD and an essential part of the remedy. The Court finds that the evidence presented at the hearing on this issue did nothing to change the Court's perception of this program. It is fundamental that the school children of the KCMSD be given every advantage at the earliest possible age and this program addresses that need. The State argues that the District is receiving a windfall because Full-Day Kindergarten is a qualifying requirement for certain monies under the new school foundation formula known as S.B. 380. The Court finds that the fact that the district receives additional resources from the State's formula because a portion of the formula recognizes the benefits of the Full-Day Kindergarten program is of no consequence when determining whether to include that program as part of the remedy. The Court has found that the State is a constitutional violator and is required to fund the remedy as ordered by the Court. The fact that the District is going to receive additional revenues under the new foundational formula is irrelevant to the consideration of obligations due the plaintiff school children as a result of the constitutional violations of the State. The Court will not allow the offset of Full-Day Kindergarten monies by any additional amount received under S.B. 380. The Court will grant the joint motion with respect to the Full-Day Kindergarten component as proposed.

SALARY ORDER

With respect to the KCMSD's motion to alter or amend the Salary Order the Court has previously indicated its inclination to issue an order clarifying its original opinion. The Court has fully considered the arguments presented by the parties and finds that there exist two major issues to be addressed. First, is the issue of whether there is to be an actual cash outlay to current teachers in

compensation for lost steps. It was the original intention of the Court to put the teachers in FY93-94 on the step where they would have been had there been consistent step increases in the past. The Court by its June 30, 1993 Order did not intend to have the District make a cash outlay to the teachers for foregone step increases. However, the teachers currently in the district will receive the prospective benefit of lost step increases by being placed on the higher steps for which they are eligible.

The next issue addressed by the KCMSD's motion to alter or amend the Salary Order is in the area of step increases for administrators. In its Order of June 30, 1993 the Court intended to restore lost step increases *only to teachers*. The Court granted a two percent pay increase to the administrators and it was the intention of the Court that such pay increase be a flat rate increase. As a matter of illustration, an administrator who made $100 in FY92-93 would receive $102 in FY93-94 and a similar two percent increase in each of the other years covered by the Salary Order. The Court did not intend to adopt the salary proposal of the District which allowed for step increases for administrators. It was the sole intention of the Court that the administrators receive a two percent flat rate increase.

The Court, by this Order, does not intend to disparage the administrators and other non-represented personnel of the KCMSD and finds specifically that the proper administration of the district is imperative to the continued success of the desegregation program. However, as a matter of fiscal conservatism in the face of the budget constraints faced by the District the Court finds that it is appropriate only to allow for a small increase in compensation at this time. The Court believes that the District may have opportunity to provide further increases through the operating budget for administration but further finds that a sufficient level of support is currently provided through desegregation funding.

The KCMSD next queries whether it was the Court's intent to disallow the equity adjustments previously provided by the Court in its Order of June 25, 1992. The Court finds that this equity adjustment for administrative and non-represented personnel was previously approved by the Court but not fully implemented by the District. While this adjustment would result in an initial increase of over two percent in FY93-94 it is the intention of the Court that this equity adjustment be allowed. The Court having previously allowed such an adjustment is not inclined to subsequently disallow it. The Court considered the flat rate two percent per year incremental adjustment ordered on June 30, 1993 to be made in addition to the equity adjustments approved in the June 25, 1992 Salary Order. Therefore, the Court will disallow the step increases for those persons contemplated by the District's motion but the Court will again approve the equity adjustments allowed in the June 25, 1992 Salary Order.

The last issue for consideration by the Court is the State's motion for an order expressly establishing a right of contribution both retroactively and prospectively. The matter was originally brought before the Court as a part of the Salary dispute previously resolved by the Court's Order of June 30, 1993. The Court is currently in the process of evaluating the submissions of the parties on this issue and expects that a ruling will issue in the near future. However, as of this date, the Court will not announce its findings as to the contribution issue. The Court will defer ruling on this issue at this time.

Accordingly, it is hereby

ORDERED that the KCMSD's motion for approval of final FY92 staging costs is approved; and it is further

ORDERED that the KCMSD's motion to alter or amend the Court's June 30, 1993 Salary Order is granted in part and denied in part; and it is further

ORDERED that the step increases for administrators and other non-represented personnel contemplated by the KCMSD's motion to alter or amend the Salary Order of June 30, 1993 are not allowed by the Court; and it is further

ORDERED that the equity adjustments previously ordered by the Court in its June 25, 1992 Salary Order are again approved for inclusion in the Salary Order of June 30, 1993 as amended herein and that the administrators and other non-represented personnel are to receive a flat two percent per year increase in compensation; and it is further

ORDERED that the joint motion for approval of *Milliken II* funding is granted in part and denied in part; and it is further

ORDERED that the joint motion with respect to those items subject to the joint stipulation is granted; and it is further

ORDERED that the joint motion with respect to the adjustment for special education teachers in the Base Budget component is granted; and it is further

ORDERED that the joint motion with respect to the maintenance component is granted except that the District is directed to use August 1991 as the baseline for calculation of desegregation related maintenance expenses; and it is further

ORDERED that the joint motion with respect to the security component is granted in that the current budget is ordered extended but the Court denies the motion for additional personnel or equipment except the Court will allow the expenditure of desegregation funds for walk-thru metal detectors as proposed; and it is further

ORDERED that the joint motion with respect to the Effective Schools is granted and funding is approved for FY93-94 and the District is directed to submit to the Court a complete evaluation of the program in the event the District returns to the Court for renewal of funding; and it is further

ORDERED that the joint motion with respect to Full-Day Kindergarten is granted and the State's request for offset of S.B. 380 monies is denied; and it is further

ORDERED that the Court approves the budgets as submitted except as modified herein with joint and several liability; and it is further

ORDERED that the District shall use the AAA minimum standard; and it is further

ORDERED that the motion of the State for an order expressly establishing a right of contribution is deferred pending further analysis by the Court.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: July 30, 1993

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: April 16, 1993]

This matter comes before the Court on the Kansas City Missouri School District ("KCMSD") and Plaintiffs' Joint Motion for Approval of the Long Range Magnet Renewal Plan ("LRMRP") and also, Plaintiffs' Proposed Additions to the LRMRP. The State of Missouri ("State") has responded as well as the American Federation of Teachers Local 691 ("AFT"). This matter was the subject of extensive briefing before this Court. A hearing was held in two parts and the Court received evidence concerning the LRMRP. Additionally, the Court received substantial post-trial briefing from the parties. Based on the arguments presented by the parties in the above referenced pleadings and on the evidence presented during the approximately three weeks of hearings the Court will grant the KCMSD and Plaintiffs' motions in part and deny them in part as set out below.

The Court will first note that the District has been adjudged a constitutional violator in the action before this Court. It is somewhat ironic the posture that this case has taken over the many years it has been ongoing. The District, a constitutional violator, is now before this Court on joint motion with the

plaintiff school children requesting that the Court extend for ten years a magnet program with an estimated budget, in 1992 dollars, totalling well over $500 million. The State, also a constitutional violator, has historically opposed the implementation of any program offered to desegregate the KCMSD. The Court recognizes that the State has had to bear the brunt of the costs of desegregation due to the joint and several liability finding previously made by the Court. However, the State has *never* offered the Court a viable, even tenable, alternative and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD.

The Court must consider the history of this case before it can pass on the ten-year extension proposed by the District. More importantly, a ten-year extension of the Magnet Program requires that the Court carefully evaluate both its perceptions and those of the parties of what the future of this case will bring. The Court recognizes that there has been substantial activity in the Missouri Legislature which could impact significantly on the ongoing administration of the KCMSD desegregation program. Additionally, there are other components of the desegregation program already implemented by the Court which must be considered before the Court may pass on a ten-year extension of the Magnet Program component. The Magnet Program does not operate in a vacuum, therefore, any proposed extension should not be considered without full weight being given to the other aspects of the KCMSD desegregation plan.

A point of much concern to the Court, yet barely addressed by either the District or the plaintiffs, is how the KCMSD proposes to ultimately fund the school system developed under the desegregation plan. The Court finds it greatly satisfying that the District is willing to plan and assume its desegregation obligation over the next ten years. It is without question a necessity to make sufficient plans to provide for a stable school system and to make it even more attractive to non-minority suburban and

private school children and their parents. However, a glaring omission is a plan by which the District proposes to fund this wonderful school system being built.

Statement of the Case

In the Joint Pretrial Order the parties listed their different views of the issues to be presented to the Court in the LRMRP Hearing. The Court finds it is appropriate to set out each of the parties understandings as it is necessary to the ultimate resolution of these issues.

The Kansas City. Missouri School District

On September 1, 1992, the KCMSD, together with the Jenkins plaintiffs filed with this Court a Joint Motion for approval of the LRMRP. The LRMRP provides for the continuation and funding of existing magnet programs on a modified basis over the next ten years. Additionally, the LRMRP provides for the implementation of certain new magnet programs, notably at the remaining traditional elementary schools as necessary to address an accelerating trend of racial isolation in those schools. The LRMRP includes a ten-year budget (stated in 1992 dollars), to be funded by the State of Missouri and the KCMSD on a joint-and-several basis. The LRMRP is designed to enhance the KCMSD's ability to attract to its schools new students, both minority and non-minority, and thereby present the most reasonable prospect of continuing desegregative progress in Kansas City's schools. (Joint Pretrial Order at 1-2).

Plaintiffs

In addition to their role in working with the District to develop and submit to the Court the LRMRP, on November 13, 1992, plaintiffs separately filed with the Court a motion for an order approving certain additions and other changes to the proposed Renewal Plan. Plaintiffs thus seek approval by the Court of the LRMRP as modified by their subsequent proposal in 25 specified respects. While the KCMSD agrees that most if not all of plaintiffs' proposed modifications would enhance (to greater or lesser extent) the Renewal Plan, the District does not in most instances view them as absolutely necessary to the future success of the LRMRP.

The AFT

The AFT generally supports the LRMRP with certain modifications. The AFT did not take an active role in the hearing except to the extent that it elicited testimony regarding the possible effects of any changes in the LRMRP on the ultimate ability of teachers to perform their responsibilities.

The State of Missouri

On November 13, 1992, the State submitted to the Court a memorandum in opposition to plaintiffs' and the KCMSD's Joint Motion for approval of the LRMRP. Characterizing the original (and current) Long Range Magnet Plan as a failure, the State requested that this Court reject the ten-year Renewal Plan and order only a one-year extension of the existing magnet programs at current budgetary levels. Moreover, the State proposed that there occur an additional analysis during the one-year extension of the status of the magnet program as a desegregation remedy in this litigation; such analysis would identify whatever particular magnet programs or schools should be preserved from termination after the conclusion of the one-year extension. Furthermore, the State requested a Court order that the KCMSD (beginning in 1994-95 and for a total of at least three school years) turn over to the Missouri Department of Elementary and Secondary Education three District elementary schools for implementation of an Outcome-Based Education pilot program. The State also proposed that, if the ten-year extension and expansion of the magnet plan is approved, the Court remove control of the operation of the KCMSD from the current Board and Administration. (Joint Pretrial Order at 3).

Contested Issues of Fact and Law

The parties were unable to agree on the contested issues of fact and law and submitted their own separate statements on what each thought the appropriate issues were. The District submitted the following issues. First, whether the magnet programs have contributed to improving the educational lot of the victims of unconstitutional segregation and whether approval of the LRMRP would likely result in additional educational progress. *See, Jenkins v. Missouri*, 855 F.2d 1295, 1302 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989).

The second issue was whether implementation of the magnet plan has contributed toward the Court's goal of regaining those students who earlier participated in white flight and retaining those who stayed in the KCMSD, and whether the LRMRP would result in the attraction and retention of additional non-minority students. Next was whether the magnet programs have redistributed the students within the KCMSD for maximum desegregation and whether the LRMRP would result in the stabilization and further enhancement of desegregative gains.

The fourth issue raised by the District was whether the proposed LRMRP developed by the KCMSD and plaintiffs was appropriately based upon a careful analysis of the plan's impact upon other components of the desegregation plan, and is geared toward (a) maximizing the future achievement of desegregation with a minimum amount of resources; (b) providing long-term stability, including in terms of future financing; and (c) incorporating a carefully designed marketing program based upon clearly defined themes. Next, was whether the proposed staffing, non-salary resources, and related capital projects proposed in the LRMRP are necessary to the success of the programs and general curriculum at the magnet schools; and whether the staffing concerns raised by plaintiffs in their supplemental proposal are necessary to the success of the magnet programs. *See, Liddell v. Board of Education*, 967 F.2d 1241, 1245 (8th Cir. 1992).

The last issue raised by the District was whether approval by the Court of (1) the LRMRP, or (2) the one-year extension proposed by the State, including the takeover of three elementary schools for implementation of an OBE program with the express understanding that the magnet program would be partially or completely dismantled over time — would better promote desegregation as envisioned by this Court throughout its monitoring of the present litigation.

The plaintiffs raised the issue of whether the 25 separate proposed additions were appropriately considered as a necessary part of any LRMRP to promote and sustain the desegregation of the KCMSD. Plaintiffs' next issue was whether their proposed additions were necessary to promote and achieve academic success in the KCMSD. Lastly, the plaintiffs raised the issue of whether it is necessary and appropriate to implement a ten-year LRMRP.

The State raised a series of issues as to the previous effectiveness of the magnet programs in general and specifically as to any future implementation. The State first asked whether the current magnet program has had sufficient desegregation or academic achievement success to warrant a continuation or expansion of new, untested themes in the KCMSD. The State next presented the issue of whether the KCMSD under a new magnet program could attract sufficient additional non-minority students to attain a district-wide or school-by-school ratio of 60% minority 40% non-minority or whether the new magnet program could ever provide academic achievement to a level constitutionally required to enable the KCMSD to attain unitary status. The State raised the further issue of whether magnetizing all of the currently "traditional" elementary schools was necessary to meet the goals stated above.

The next area of interest to the State was appropriately finance. The State raised the issue of whether a long-term financing program has been developed by the District to (1) fund

the District's share of the desegregation remedy beyond the current year and (2) provide a funding mechanism by which the District will continue the magnet programs after State funding is no longer required. The issue of whether the capital resources proposed for the first year of the LRMRP were justified was also raised.

The State raised the further issue of whether a one-year interim continuation of the present magnet school program would be appropriate to allow for additional study and evaluation of the magnet program. Also offered was whether the Outcome Based Education model in three of the schools might provide a better basis for education in the KCMSD. Additionally, the State raised the issue of whether the possibility of a Voluntary Interdistrict Transfer program might allow for implementation of a less costly magnet program.

Lastly, the State brought forward the issue of whether the study of demographic trends within the KCMSD and surrounding census areas and the public opinion survey of resident parents of the school districts surrounding the KCMSD, both of which were conducted by State experts and which (as argued by the State) limited additional attractiveness to non-minorities and virtually no potential to reach 60/40, provide a basis upon which the Court should deny the extension and expansion of the magnet plan and justify a one-year evaluation period. Moreover, the State was concerned with whether the proposal for neighborhood schools warranted additional time and consideration.

With this background of the posturing of the case in mind, the Court will proceed to address the contentions it believes are necessary to the resolution of the main issue before the Court: whether the Court should order the ten-year extension and expansion of the magnet programs *and* hold the State financially accountable for the LRMRP throughout the entire period.

FINDINGS OF FACT

After due consideration of the evidence presented by the parties at both parts of the hearing on this matter, the Court makes the following findings of fact:

1. Since 1986 the KCMSD magnet school plan has made substantial progress toward desegregating the schools of Kansas City. It has eliminated all fifteen elementary schools that had suffered the most intense racial isolation and it has substantially improved the elementary school exposure index.

2. While several secondary magnet schools have not been in operation for more than a few years, some progress has been made in integrating those schools. Several middle and high schools have achieved high levels of integration, including King Middle School of the Arts, Lincoln Prep and Paseo Academy. Other secondary schools have programs that should, in the future, increase desegregative success.

3. The KCMSD magnet school program has had some impact upon residential choices of Kansas Citians. There is evidence that because of the magnet schools some parents of white students who would earlier have moved out of the KCMSD have stayed and enrolled their children in the magnet schools.

4. There remains a substantial pool of non-minority students, especially in surrounding Missouri school districts, who are interested in attending and may be persuaded to attend the KCMSD magnet schools.

5. A ten year extension would have a positive impact on the attractiveness of the KCMSD magnet school programs by offering stability and continuity to prospective participants. Additionally, a ten-year extension would undoubtedly be of benefit in attracting quality teachers and administrators to the magnet schools.

6. The District has gone through an extensive evaluation and planning process in its preparation of the LRMRP. However, the District has provided the Court with a plan based solely on the theory that *all* of the schools in the KCMSD should be magnetized.

7. The evidence supports the conclusion that there has been increased racial isolation in the traditional elementary schools since the implementation of the LRMP. Moreover, there exists some evidence which suggests that some students have responded positively with respect to academic achievement within the magnet elementary schools.

8. The evidence before the Court supports the conclusion that a substantial number of patrons of the KCMSD advocate the continuation of some form of traditional elementary school education.

9. Extending the magnet program to include all of the currently traditional elementary schools would not, based on the current evidence, significantly impact the desegregative or achievement effort of the current magnet plan. Furthermore, based on the current sentiment testified to in the hearing, there is a significant population supporting traditional elementary school education and this population is very important to the ultimate success of the desegregation effort in the KCMSD.

10. The Montessori programs presently in the elementary schools have been an extremely popular theme. There have been long waiting lists for this theme. The evidence sufficiently supports the addition of one more Montessori elementary school.

11. The Outcome Based Education (OBE) program offered by the State has several components which are educationally attractive. However, the OBE program is an educational delivery methodology which does not rise to the level necessary to build an entire theme for a magnet school.

12. The OBE program offered by the State is not a credible alternative to the LRMP currently in effect.

13. There is an astounding lack of evidence to support the State's proposition that it should take over and operate three elementary schools within the KCMSD. The proposal by the State, through its purported experts, lacked sufficient specificity to be considered in any way credible.

14. The LRMRP, as proposed, makes significant changes to the current structure of the administration in the KCMSD. The current fiscal climate and the requirements of effective delivery of services within the magnet school program do not necessitate the extreme reorganization contemplated by the LRMRP.

15. The LRMRP, while making some very important changes in magnet themes, is too extensive a change at this time to justify its implementation.

16. There are certain theme changes that are supported by the evidence.

17. The Court finds that the evidence presented by the District with respect to achievement data to be generally credible. The Court finds that the evidence is clear that there has been a trend of improvement in academic achievement in the KCMSD. However, the Court is not satisfied that the District has reached anywhere close to its maximum potential because the District is still at or below national norms at many grade levels. Nor does the Court find that the data presented by the District is necessarily indicative of a clear trend of the magnet schools consistently outperforming the traditional schools. The Court finds that there is no way to make a competent comparison at the higher grade levels as no traditional schools exist at these grades. The Court finds that the achievement data provided by the District is reliable but is not probative to the extent which the District used to make its sweeping conclusions as to academic success.

Moreover, the Court finds that the studies conducted by the State are reliable but not to the extent necessary to draw the doomsayer's conclusions reached by the State with respect to the success of the magnet program. The Court finds that the achievement success of the magnet schools has been positive overall but is not truly reflected by the conclusions asserted by either party.

18. The Court finds that the District, through the magnet program, has made positive steps towards reaching the desegregation goals of the Magnet Plan. This is evidenced by the testimony of the District's expert, Dr. Gary Orfield, showing the exposure index to have made positive changes during the course of the LRMP. However, the Court finds that the District's overall minority/non-minority ratio of 74%/26% does not comport with the requirements previously announced by this Court for the desegregation objective of the Magnet Plan.

19. Neither the District nor the plaintiffs has offered a plan for financing the expanded magnet school program. The Court finds that it would be inappropriate to order such a long-term extension of the magnet program without a clear method of financing it other than relying on State funding through joint and several liability.

20. In order to have a clear view of the future of the magnet school program, as well as the desegregation program generally, and in light of the changes of state leadership and the activity in the Missouri Legislature, it is necessary for the Court to have before it a viable plan by which the District will fund and operate the magnet schools of the KCMSD after Court ordered funding by the State is withdrawn.

Extension of the LRMP

The Court is faced, as usual, with diametrically different proposals provided by the parties in this litigation. The Court has previously found that the desegregation program which this

Court has undertaken requires a magnet component in order to succeed in reaching the goals which have been repeatedly articulated by this Court. However, neither of the proposals put forth by the parties in the LRMRP hearing phase comport with the requirements of the magnet component as envisioned by the Court. Each of the parties have submitted concepts which should definitely be included in the magnet component. However, the Court is left with the undesirable prospect of formulating, on its own, the magnet component for the desegregation plan.

In the past the Court has consistently allowed the District to indulge in speculation as to what benefits different magnet programs will have in the KCMSD. In short, the Court has allowed the District planners to dream. The Court then has provided the mechanism for these dreams to be realized. The Court has found that many aspects of the LRMP have been completely successful. The testimony of the students, parents, and teachers as to the rejuvenated physical plant of the KCMSD stands in sharp contrast to the testimony which precipitated the Court's original formulation of the magnet school program. There is no doubt that the educational opportunities afforded in the magnet schools are better than that previously available. However, the LRMRP offered by the District and plaintiffs illustrates the District's ability to dream. The Court finds that it is time that the District be subject to a very definite reality check. The plaintiffs have recognized that in several areas the District has sought to cut the current magnet programs to justify its extravagance in the LRMRP. However, the plaintiffs are just as guilty in that they too, have included extravagant expansion of the magnet component.

In fashioning the magnet component to the desegregation remedy initially, the Court ordered the construction and implementation of certain well-defined magnets. Many of these magnet themes have been very successful in attracting and retaining non-minority students. The Paseo Academy has been successful

as exhibited by the waiting lists for admission. Additionally, the Montessori programs have been quite attractive at the elementary school level. The Lincoln College Preparatory Program also has been successful in attracting non-minority students. Moreover, each of the above listed programs have impacted the achievement of both minority and non-minority students in a very positive way.

The parties agree, if but on only one thing, that some of the themes implemented in the LRMP have not been as successful as predicted when they were submitted to the Court. The District has not appropriately identified the magnets which are unsuccessful. Rather, the District has used the LRMRP as an opportunity to again reassign responsibilities and job descriptions. There has been a very significant introduction of new themes at the elementary school level and an adjustment to feeder patterns throughout the magnet program. The Court applauds the better definition of feeder patterns by the District but finds that such accomplishments may be made without magnetizing all of the elementary schools in the district.

The Court sets the following guidelines for the District to use in the further implementation of the LRMP. The Court will first note that it is *not* adopting the extensive restructuring of the LRMRP. It is just as true that the Court is *not* adopting the one-year roll-over, for the purpose of finding the best way to dismantle the magnet program, as proposed by the State. What the Court *is* adopting is an extension of the magnet component of the desegregation program with certain specific additions and with the express understanding that the District may make modification to themes within the current structure *and budget* in order to eliminate ineffective themes and ensure that the magnet program meets the previously announced goals of desegregation and achievement.

The Court has found that the Montessori elementary education program has been a highly successful magnet theme. Therefore, the Court will order that the District establish one additional Montessori magnet theme. The District shall use the new elementary school which is to come into the school system in the 1993-94 school year for the new Montessori school. The Court will allow for the modification of this school's budget to account for the implementation of the Montessori theme. The budget offered by the District for such an additional Montessori elementary school under the LRMRP presupposed a change in personnel and structure which the Court does not adopt. Rather, the District should use the current Montessori program budgets as the model for implementation of the new elementary school.

The six "1986-87 Magnets" — *i.e.*, Lincoln College Prep, the Southwest Cluster, and Swinney-Volker — have been responsible for differing degrees of success. Nonetheless, the Court finds that they should be extended through the period contemplated by this order. These 1986-87 Magnets should be funded under the Magnet Plan as adopted by this order. However, the Court finds that the District shall continue to fund the schools represented as the 1986-87 Magnets at the same level as they currently exist with the exception of modifications made necessary at Lincoln College Prep as discussed below. The Court specifically finds that the changes to the budgets of those other 1986-87 Magnets as proposed by the District in the Renewal Plan are not to be implemented. The Court finds that it is imperative to the continued success of programs such as Swinney-Volker that the budgets be maintained at the current levels. The District should be able to continue the operation at the current levels as the Court is in essence ordering the transfer of the 1986-87 Magnet funds to be, appropriately, a component of the LRMP budget approved herein.

The Lincoln College Preparatory program has been a very successful program. The Court finds that the expansion of seats proposed by the District for this program to be an appropriate method of expanding the accessibility of this program. More-

over, the Court finds that the conversion of the Middle School facility and the integration of this program with that of the high school at Lincoln College Prep would have a beneficial effect on the ability of the District to implement this highly successful theme. The Court will order that the District implement the changes necessary to transform the Lincoln South facility into the College Prep middle school facility. Again, the Court finds that the current budget allocated to those programs to be transformed should be adequate to fund the resulting middle/high school programs. However, should the District find that there exists a budgetary shortfall or windfall in this area, as a direct result of the conversion, the Court will entertain motions for adjustments as necessary.

The Court has considered the LRMRP's modification to the Foreign Language Immersion Program and finds that the purported benefits do not justify the significant changes to the program. This is a result of the Court's refusal to magnetize all of the elementary schools in the district. The LRMRP's adjustments to the Foreign Language Program presupposes total magnetization. The Court has not agreed that the traditional schools should take on the themes as suggested in the LRMRP. Therefore, the theme changes in the Foreign Language Program are inappropriate. The Court does find that the District is correct in its assumption that the Full Immersion programs are successful. The demonstration made by the third-grade science class, in french, at trial was very impressive. As the Court has stated on many occasions, it is not an expert on the methodology of educational instruction. Therefore, the Court will grant the District the appropriate latitude to implement full-immersion programs within the language programs available under the LRMP. The Court will deny any other modifications as they might apply to the traditional elementary schools.

The Court finds that the Lengthened School Day and Extended Year programs are both successful programs in promoting desegregation and achievement in the KCMSD. However, the changes promoted by the Renewal Plan are not going to be adopted by the Court as a part of the Renewal Plan. The Court finds that these programs should be continued as they are currently being administered. The Court will order continued funding of these programs as done under the LRMP and under the other funding components of the desegregation program. There shall be no changes as to these two programs.

The Renewal Plan proposes significant changes in the area of staffing. This has been a primary concern to the Court throughout its evaluation of the Renewal Plan. The State is correct in its assertion that the management of the magnet program has been anything but stellar. (The Court has taken the liberty of summarizing the State's consistent position on the management of the magnet program). The Renewal Plan proposes what the Court interprets to be an entirely new level of administration for the magnet plan. If there is one thing that the KCMSD certainly has enough of it is administration. The administration of the magnet schools has, in many instances, left much to be desired. The last thing this Court is inclined to do at this point in the development of the magnet program in the KCMSD is to add another layer of administration. The Court is quite satisfied that the teachers have given their best efforts in educating the young people in the KCMSD. However, the administration, from the building supervisors up, need to work with much more industry to effectively implement the current themes offered in the district. The Court has become aware on several occasions of administrators who have not adequately sought to become certified in their respective theme. It is because of the current state of the administration in the magnet programs that the Court finds that the implementation of the changes in the Renewal Plan are wholly inappropriate.

The Renewal Plan proposes an extensive process for evaluation of the magnet plan. This process of evaluation appears to include a large amount of administration. While the Court finds

that evaluation of the magnet program is desirable and necessary, the Court finds that the program offered by the District through the Renewal Plan does not attain the goal of evaluation in the most cost effective manner. The Court will instruct the District to make arrangements to effectively evaluate the magnet programs over the extension period. The Court will view the results of the District's efforts with a very critical eye at the point in the future where the Court is called upon to determine any additional extensions.

The next item considered by the Renewal Plan is the non-salary budget. The District has made extensive analysis of the individual magnet programs and developed an estimate of what the upkeep on these programs will be over the next ten years. The Court finds that the figures presented by the District are unreliable because they are based on the primary assumption that the Renewal Plan would be adopted as proposed, including the many changes in themes. The Court does recognize that the equipment provided in the original LRMP has a finite life. The current budgeting process used by the district includes provisions for capital replacement. The District may argue that the inclusions are insufficient. The Court, at this point, will deny the extensive magnet resource component of the Renewal Plan and order the District to continue operation of the magnets within the budgets as currently set for their operation. The plaintiffs illustrated the problem of ordering a strict one-year roll-over of the budgets in that there are several items which were one-time expenses that do not need to be included in a subsequent budget. The Court has considered this fact and finds the plaintiffs' point to be well taken. However, the Court will allow the District the budgetary flexibility, subject to review by the DMC as per the past course of business, to make appropriate adjustments for the upcoming school years.

The last area of concern to the Court in the Renewal Plan is the capital facility requirements. The Court has reviewed with

severe dismay the progress of the Capital Improvement Project previously ordered by this Court. The Court is aware of significant difficulties with the Project Management Team and bringing the project in on-time and on-budget. The Court has previously denied the implementation of the many new themes requested by the District under the Renewal Plan. The prospects of a voluntary interdistrict transfer program and pending legislation in the Missouri Legislature both support the Court's decision to deny the capital improvements requested by the District in the Renewal Plan. As it has been well shown that the capital facility requirements are being met under the current plan, the Court finds that it would be inappropriate to extend that program at this point.

The Court finds that a ten-year plan by the District as to the future of the magnet plan and the desegregation program in general is a superior concept. The Court supports the District's effort in that regard. The Renewal Plan offered by the District is not supported by the evidence and for the reasons previously announced the Court will deny its adoption.

The magnet program has provided significant advantages to the students of the KCMSD. The neighborhood school options, however, are a very important aspect of the KCMSD system generally. The Court has helped the District fashion a magnet program to allow a choice to the non-minority parents and students enrolling in the KCMSD. However, the District's Renewal Plan fails to protect this same choice to those currently living in the KCMSD. The opportunities available in the traditional schools are important to a significant number of parents and students in the KCMSD. The Court is troubled by the fact that these traditional schools have maintained a pattern of racial isolation. The Court finds that this is in part due to the poor planning and administration of the KCMSD. The District should explore more carefully its options in assigning students to reduce racial isolation. The evidence showed, on more than one occa-

sion, that racially isolated schools (90+ % minority) exist in predominately non-minority neighborhoods. This evidences to the Court either a lack of effort or an intent on the part of the District.

The Court has before it the motion for a ten-year extension of the magnet plan. It is important to the Court that the magnet plan be maintained, as is, due to its positive impact on both the desegregation effort and on achievement. However, the plan offered by the District does not accomplish the needs of the magnet plan. The Court will order a two-year extension of the current plan with the modifications as outlined above. This two-year extension is necessary to maintain the integrity of the programs currently offered and to allow the District to better measure the effectiveness of the programs.

The District has repeatedly requested that the Court provide extravagant programs based on the hopes that they will succeed in the desegregation effort. The Renewal Plan offers many of these same types of extravagances. The Court finds that the current plan has both the present and future potential to succeed in its major effort of desegregation. What the Court needs from the parties is an effective method by which the District may fund its share of the programs. The District's proposals do not include a viable method of financing any of the programs.

The Court, in giving due consideration to the viability of any future extensions of the Long Range Magnet Plan, has found that certain information would be beneficial. The economic feasibility of financing the desegregation effort in the KCMSD has not been addressed sufficiently for the Court. The Court, therefore, instructs the District to submit a financing proposal to the Court and in doing so it should follow the assumptions as set forth below.

First, the District is instructed to submit a plan reflecting the ability of the District to fund the magnet schools and the entire

school district at a level commensurate with the current funding or at least at a level where the same quality of both facilities and instruction may be maintained. In formulating this plan, the District should assume that the current Court ordered funding would be withdrawn at the alternative intervals of three, five, seven, or ten years from the date of this order. Based on this assumption, the Court instructs the District to submit a plan showing what is necessary to fund the school district through the operating budget alone. The Court expects the District to provide fairly complete operating budget projections for each of the above listed scenarios.

If the current method of financing is insufficient, the District should submit the financial ramifications of at least two financing alternatives and should use the current bills pending in the State Legislature as guides. Next, the District should present the Court with its analysis with the assumption of a status quo in the Foundation Formula. If the District chooses to submit additional analyses with varying Foundation Formula funds its assumptions should be made clear to the Court. Lastly, should the District have a solid basis to include the effect of a Voluntary Interdistrict Transfer Plan the Court would be interested in having the analysis to include such an assumption. However, the Court will order that the District provide the Court with at least one analysis that includes no VIDT plan.

Second, the State is instructed that if it so chooses, it may submit plans with the similar assumptions as outlined for the District above. The Court is not ordering the State to submit such a plan but if the State finds that it has sufficient information available to make an instructive proposal then the Court will certainly be willing to evaluate such information. The Court encourages the State to submit a financing plan.

The Court has found that the above requested information would be most helpful in analyzing the long term planning for the

desegregation plan. Therefore, the Court will order the District to submit its analysis by June 30, 1993. The State will also have until September 1, 1993 to submit any analysis which it finds would be of benefit to the Court.

Accordingly, it is hereby

ORDERED that the KCMSD and plaintiffs' motion for approval of the Long-Range Magnet Renewal Plan is denied in part and granted in part consistent with this order; and it is further

ORDERED that the current LRMP is extended for a two-year period with the same budgetary levels subject to reasonable modifications with the supervision of the DMC; and it is further

ORDERED that the District is to implement a procedure to consistently measure and evaluate the effectiveness of the magnet programs and this is to be done within the current budgetary constraints of the magnet program; and it is further

ORDERED that the District is to implement a Montessori theme at the new elementary school to come on-line for the 1993-94 school year; and it is further

ORDERED that the District request to modify the themes at Lincoln College Prep and Middle School is granted; and it is further

ORDERED that the State's request to operate three District schools under an OBE program is denied; and it is further

ORDERED that the District is to submit a financing proposal as outlined herein by June 30, 1993; and it is further

ORDERED that the State may, but is not required to, submit a financing proposal by September 1, 1993; and it is further

ORDERED that the capital improvements requested by the District are granted only to the extent necessary to implement the theme additions and modifications approved by the Court herein.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: April 16th, 1993

Supreme Court, U.S.
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MAR 1 1994
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No. 93-1823

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS KANSAS CITY, MISSOURI SCHOOL DISTRICT AND AMERICAN FEDERATION OF TEACHERS LOCAL 691

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the lower courts, in a case of prolonged State-mandated racial segregation with devastating effects on the educational opportunities available to the plaintiff school children, acted within their discretion in refusing to terminate remedial educational improvement programs as "unitary" where they found that the defendant seeking termination had not shown (1) that the vestiges of segregation which such programs were designed to remedy had been eliminated to the extent practicable; or (2) that release of jurisdiction in these areas would not have adverse consequences on other admittedly non-unitary aspects of the school system; and where there was no evidence (3) that the defendant seeking such termination had demonstrated a good faith commitment to its constitutional obligation.

2. Whether the lower courts acted within their discretion to extend orders mandating that the State defendants help to maintain school district salaries at levels repeatedly found necessary to successful implementation of a largely voluntary desegregation plan, where the deplorably low original salaries were in part the result of the State's constitutional violation affecting school district funding.

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COUNTERSTATEMENT OF THE CASE

The Court described the background of this case in *Jenkins v. Missouri*, 495 U.S. 33, 37-45 (1990). This most recent petition [1] involves two longstanding elements of the desegregation remedy for Kansas City, Missouri public school students—educational improvement programs and employee salary funding—that the courts below repeatedly have found necessary to successful implementation of the desegregation plan. The educational pro-

[1] In this opposition, we cite the petition as "Pet." and the appendix attached to the petition as "App."

grams and salary relief are integral parts of a remedy that the lower courts have found is working, but has not yet eliminated to the extent practicable the vestiges of decades of racial segregation that the State of Missouri (the "State") mandated in the Kansas City, Missouri School District ("KCMSD" or the "District"). App. 112-13, 129-32. The State has asked this Court to review the lower courts' decision that the educational programs should not be terminated as "unitary," despite the established facts—which the State has never challenged as clearly erroneous—(1) that vestiges of segregation remain and can practicably be remedied; (2) that the termination of these programs would make it impossible for the defendants to comply with orders in other areas that the State has admitted are not unitary; and (3) that the State has made no showing of its good faith commitment to the district court's orders. App. 19. The petition also seeks review of the lower courts' long-settled factual conclusions that District employees' salaries near market levels are necessary to the success of the desegregation remedy and that the State's constitutional violation is in part responsible for the District's inability to produce sufficient revenues to maintain such salaries without assistance.

The Orders That Are The Subject Of The State's Petition

A. The Educational Improvement Programs

The first question in the State's Petition arises from its opposition to the District's motion to continue for the 1992-93 school year a series of long-standing educational programs that were part of the district court's original remedy in this case. The remedy was ordered because, in September 1984, after a 64-day trial, the district court (The Honorable Russell G. Clark) found both the State and the District liable for unconstitutionally segregating the schools of KCMSD and for failing in their affirmative duty to undo the harm of that segregation. Judge Clark found that the "inferior education indigenous of the state-compelled dual school system has lingering effects in the

Kansas City, Missouri School District," and that State-mandated segregation has resulted in the continued racial isolation of minority students. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1492-93 (W.D. Mo. 1984).

Judge Clark recognized "the frequent admonition from the Supreme Court to tailor the remedy to fit the scope of the violation," June 5, 1984 Order at 97, and that "the goal of a desegregation decree . . . is the elimination of all vestiges of state imposed segregation." *Jenkins v. Missouri*, 639 F. Supp. 19, 23 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986) (*en banc*). *cert. denied*, 484 U.S. 816 (1987). The most important vestiges he found were "a system wide *reduction* in student achievement in the schools of the KCMSD," *Id.* at 24 (emphasis in original), "low achievement" and a "general attitude of inferiority among blacks," 593 F. Supp. at 1492-93; racial isolation in the schools; and severe deterioration in the physical conditions of the schools.

On the issue of student achievement, the district court recognized the deficits in the education and basic skills of KCMSD students caused by prior segregation and the need for the remedy in this case to address them. The court cited with approval research by the Missouri State Board of Education stating that "because so many students have not mastered requisite skills thoroughly and because teachers must spend so much time helping them 'catch up,'" 639 F. Supp. at 28, the educational process for all students becomes unduly slow. The court then specifically found that "[the] education process has been further 'bogged down' in the KCMSD by a history of segregated education. Too often, as a result, a higher percentage of black students are among the lower achievers." *Id.* Segregation also harmed student achievement, Judge Clark confirmed, because as this Court held in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954), segregation had "ruin[ed] attitudes" of students in KCMSD. 593 F. Supp. at 1492-93.

Judge Clark also found pervasive segregation remaining in these schools, where learning was so limited. Judge Clark found that "as of 1974, 20 years after *Brown I*, 39 schools were more than 90% black" and that "[e]ighty percent of all blacks in the District attended schools that were 90% black." 593 F. Supp. at 1492-93. By 1983-84, there were still "24 schools . . . racially isolated with 90+% black enrollment" and the dual school system had not yet been dismantled. *Id.* at 1493. The segregated system had caused the departure of whites to private schools and the suburbs. August 25, 1986 Order at 1-2.

Judge Clark further found that the school buildings in which this dual system operated had "literally rotted," *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 855 F.2d 1295 (8th Cir. 1989) (*en banc*), *aff'd in part and rev'd in part*, 495 U.S. 33 (1990), and that the lack of revenue that had caused this deterioration flowed directly from the State's failure to remedy its previous unconstitutional segregation: "[T]he State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools." *Id.* at 403. In affirming the latter findings, the Eighth Circuit expressly noted that the State's failure to remedy its unconstitutional conduct fostered further segregation: "The findings of fact demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." 855 F.2d at 1305.

Judge Clark found that desegregation in KCMSD could best be accomplished through a largely voluntary desegregation plan based on educational improvements, voluntary student transfers to specialized magnet schools, capital improvements, and voluntary interdistrict transfers.[2] The cornerstone of this voluntary desegregation remedy consisted of basic educational improvements, known among the parties as *Milliken II* programs because they generally are relief of the type that this Court first expressly approved in *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"). They include additional teachers to reduce class sizes, counselors, librarians and library materials to meet State AAA-rating requirements, a full-day kindergarten program, an early childhood education program, an extended school day in selected schools, and a summer school program. The Eighth Circuit has repeatedly recognized that these programs have three complementary goals: (1) to remedy the systemwide reduction in student achievement by improving the education available to the plaintiff school children; (2) to reverse the pattern of decreasing non-minority enrollment by attracting back white students from private and suburban schools; and (3) to bring about a voluntary redistribution of children within the KCMSD. App. 18; *Jenkins*, 855 F.2d at 1302.

When KCMSD filed a motion to renew the *Milliken II* programs for 1992-93, the State argued that each program individually must be declared unitary because, under its interpretation of *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), the proposed programs had been implemented in previous years, in compliance with the district court's prior orders. On the other hand, the State also argued that several of these same programs should be terminated

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[2] The State did not appeal Judge Clark's determination that the State and KCMSD had failed to remedy the effects of their unconstitutional segregation. Neither did it appeal "substantial portion[s]" of the remedial order, including the implementation of the educational programs designed in part to remedy the systemwide reduction in student achievement in KCMSD. *Jenkins v. Missouri*, 807 F.2d 657, 682 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987).

because they were ineffective. The State subsequently stipulated to the scope of the proposals and to the budgets for more than half of the *Milliken II* programs, while reserving its argument that they were unitary.

Judge Clark conducted an evidentiary hearing on KCMSD's motion. The District's evidence addressed the need for the particular programs for which there was no stipulation with the State. Anticipating a possible attempt by the State to demonstrate partial unitary status (despite the fact that the State had filed no motion seeking such relief), the District also presented evidence that while racial isolation was decreasing and student achievement was improving in the KCMSD, additional progress in remedying the vestiges of segregation previously identified by the district court was both necessary and practicably attainable. KCMSD also presented evidence that all of the *Milliken II* programs were integrally related to each other and to the rest of the remedy; for example, the magnet plan could not function successfully without the basic educational improvements. In contrast, the State's single *Freeman* witness testified only (1) that the defendants had complied with the court orders in this area; (2) that the level of certain educational resources was higher in the KCMSD than in some surrounding school districts; and (3) that the quality of educational opportunities in the KCMSD had "improved." The State offered no evidence to suggest what the effect of the resources provided had been, just that opportunity had improved because the resources were greater. Indeed, the State's principal witness conceded that he had said nothing about the *results* of the educational improvement components of the remedy in terms of desegregation or student achievement. The State offered only conclusory—and illogical—testimony that the *Milliken II* relief in this case is not integrally related to other aspects of the remedy because the orders developing the deails of the various remedial components were entered at different times. The State offered no evidence at all about its commitment to the goals of

the court-ordered remedy. The State's other witnesses testified that certain programs that the State claimed were partially unitary were also ineffective. *See* App. 70 ("State objects that this [extended day] program is not attracting non-minority students"); ("State objects that the effective schools program has not been successful in improving student achievement").

At the hearing, Judge Clark rejected from the bench the State's argument that *Freeman* required a declaration of partial unitary status with respect to each previously implemented educational improvement program regardless of whether actual desegregation or progress in student achievement had been accomplished to the extent practicable. App. 11. He also rejected most of the State's factual contentions concerning the alleged ineffectiveness of particular programs, and ordered the continuation of most of them. App. 70-72.

Related orders that the State has not made the subject of the Petition illuminate the court's conclusion that these programs are not yet unitary. While the State's appeal on the partial unitary status question was pending, Judge Clark held a three-week hearing concerning the proposed continuation of the magnet school component of the remedy. Judge Clark found that the progress in desegregating KCMSD's student enrollment has been "substantial." App. 129. Judge Clark found that KCMSD had eliminated segregation in "all fifteen elementary schools that had suffered the most intense racial isolation," made progress in integrating secondary schools (some of which had "achieved high levels of integration"), and "substantially improved" on an index of desegregation in the schools. *Id.* Judge Clark also found, however, that more desegregation progress was necesary and practicably attainable. *Id.* Likewise, he specifically found that while "there has been a trend of improvement in academic achievement in the KCMSD, . . . the District has [not] reached *anywhere close* to its maximum potential." App. 131 (emphasis added).

Shortly thereafter, KCMSD requested continuation of the *Milliken II* programs for 1993-94 and 1994-95. The State once again argued in its opposition, without filing a motion, that these programs were unitary and that the State's funding obligation should end. At a one-day hearing, much of the evidence again was limited to factual issues on certain specific programs. The District also presented evidence of the need for continued progress in improving educational quality and actual desegregation. The State presented no live witnesses at all to support its *Freeman* argument. Its only affirmative evidence on that issue was an affidavit from the same witness who had testified in support of unitariness at the 1992-93 hearing. This affidavit, a fair summary of *all* the record evidence in support of the *State's* argument, merely reiterates that the various *Milliken II* programs had been "fully implemented," had made more resources available in KCMSD, and in many instances had brought these educational inputs to a level equal to or higher than some neighboring school districts. The State's affidavit was silent on the State's good faith, the inter-relatedness of the various remedial programs, and whether the remedy had succeeded in eliminating the vestiges of segregation to the extent practicable in KCMSD. Judge Clark again rejected the State's argument:

> The *Milliken II* component is an integral part of the overall desegregation remedy and the Court finds that the State's arguments that these components have attained unitary status are unpersuasive. The State should not be heard to complain that the desegregation plan is a complete failure on the one hand and that the *Milliken II* components are completely successful on the other. The Court finds that the State has made fundamentally flawed arguments in pursuit of an order determining unitary status in the KCMSD. The Court does find that the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy. However, these components have not yet met these goals in their entirety. The Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time. [App. 112-13.]

The Eighth Circuit affirmed the district court's findings that the State had not met its burden of establishing partial unitary status under *Freeman,* noting that the evidence established *at most* that a start had been made in eliminating the vestiges of segregation in the District. App. 19. The court concluded that the "evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable." *Id.*[3] The Eighth Circuit concluded that another reason the State was not entitled to be released from its obligations is that it had failed to meet, indeed failed even to address, two other criteria set forth by this Court in *Freeman*: "whether retention of judicial control [over the educational improvement programs] was necessary or practicable to achieve compliance with the decree in other facets of the school system," and whether "[t]he State . . . has demonstrated a good faith commitment to the whole of the court's decree." *Id.*

The State failed in an attempt to secure rehearing or rehearing *en banc*. Even the dissenters from the denial of rehearing *en banc* noted that the State had not made an adequate record to support its *Freeman* argument:

> Whether the KCMSD has actually achieved partial unitary status in the quality of its educational program imposed by the desegregation plan is, perhaps,

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[3] Two months later, in considering the State's second appeal on the question of partial unitary status, which is not a subject of this petition, the Eighth Circuit concluded that this inadequate record had not been supplemented in any meaningful way and reaffirmed its conclusion that the State had not shouldered, let alone carried, its burden of proof on the relevant issues. *Jenkins v. Missouri*, No. 93-3975, slip. op. at 4 (8th Cir. May 3, 1994).

still an open question on the record before us today. [App. 58 (emphasis added).]

The educational programs for 1992-93 that the State challenges in this Petition were provided during that school year. They were fully funded by KCMSD and the State and those orders have now been fully implemented.

B. Maintaining Salaries Near Market Levels

The second question the State raises in its Petition concerns orders affirmed by the Eighth Circuit that require KCMSD's salaries to be maintained near market levels. These orders stem from Judge Clark's requirement that KCMSD not divert resources away from its baseline education efforts to fund special desegregation programs. In 1987, Judge Clark found "that the KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program." 672 F. Supp. at 410 (citations omitted). He further observed that the competitive position of the KCMSD regarding salaries "ha[d] deteriorated significantly" and that "[c]onsequently, KCMSD's ability to attract new teachers and retain present teachers has been restricted." *Id.* The court approved the expenditure of $7.147 million of desegregation funds for each fiscal year until 1991-92 "to fund teacher salary increases." *Id.* The State appealed the September 15, 1987 order, and challenged on appeal the scope of the capital improvements plan and the court-ordered tax increases to permit the District to raise revenue toward funding some of the costs of desegregation. However, the State did not raise in either of its briefs on that appeal the approval of funding for salary increases for the 1987-88 through 1991-92 school years, and the Eighth Circuit left that portion of the order undisturbed. In 1990, following a court-ordered study of how KCMSD salary rates affect the desegregation plan, a settlement was reached among all of the parties, authorizing the KCMSD to use desegregation funds to maintain minimally adequate salaries over the next two-year period.

The result of this relief is that salary increases required to pay KCMSD personnel at roughly competitive rates are funded through what is known as the "desegregation budget." KCMSD functions with a separate desegregation budget because it is required by court orders to share desegregation costs with the State,[4] but early on it became clear that KCMSD did not have sufficient revenue to fund its full share without undermining the quality of its basic educational program and, as a result, the voluntary desegregation remedy itself. 672 F. Supp. at 410. For that reason, and because the District's inability to raise sufficient funds was itself partially a product of the State's acts of illegal discrimination, *see supra* page 4, Judge Clark concluded he had no choice but to order extraordinary funding relief, including increasing the District's property tax levy. On appeal, the Eighth Circuit modified the district court's order to enjoin certain State laws and to permit local authorities to increase KCMSD's property tax. 855 F.2d at 1314. This Court held that the district court had exceeded its equitable powers by directly increasing the property tax rate, but that the tax increase as modified by the Eighth Circuit satisfied equitable and constitutional requirements. *Jenkins,* 495 U.S. 33. As a result of these orders, the desegregation budget is funded from KCMSD's desegregation tax levy and from payments the State makes under court order. All desegregation budget expenditures must be ordered by the district court. In contrast, the operating budget is funded from various State, local and federal sources (as in any other school district in the State), and its expenditures fund most of the basic operating costs of the District. Over the years

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[4] *See, e.g.*, 639 F. Supp. at 43-46; 593 F. Supp. at 1506 ("much of the costs . . . [of] implementing a plan to dismantle the vestiges of the dual school system in the KCMSD should be borne by the State").

however, KCMSD has frequently suffered operating budget deficits that have required substantial cuts in these expenditures because the amount of operating revenue from local as well as State sources is fixed under State law. *Jenkins*, 495 U.S. at 38-39.[5] Judge Clark has repeatedly found that KCMSD's operating revenues have been insufficient to fund new obligations, such as raising salaries to keep pace with inflation or funding a larger portion of the desegregation remedy.[6]

In early 1992, the KCMSD, the American Federation of Teachers Local 691 ("AFT"), an intervenor in this case, and the plaintiff school children all sought continued desegregation salary relief. App. 76. The State, however, proposed that salaries be rolled back to their 1986-87 levels. App. 83. The State's approach would have caused starting salaries for teachers to fall from "$22,215 to just over $17,000" because of the financial limitations on the District discussed above. App. 79. After a four-day hearing, Judge Clark expressly reaffirmed his earlier fact finding that support for District salaries is essential for desegregation. App. 88. He concluded that "the basis for this Court's ruling is grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD." App. 90. "Logic and empirical data show that in the absence of desegregation funding for salaries, the District will not be able to implement its desegregation plan." App. 86. Judge Clark did not limit

[5] The District has virtually no ability to increase its operating budget revenues; most of KCMSD's revenue sources are dictated by State law and are outside of the District's control. *Id.* Because the court-authorized tax increases are solely for desegregation budget purposes, KCMSD has been unable to raise additional operating budget revenues through local property taxes. As a result, the operating budget portion of the KCMSD levy is about half that of neighboring Missouri school districts, although the total levy is one of the highest in the region.

[6] *See, e.g., Jenkins*, 672 F. Supp. at 410; August 25, 1986 Order at 3; *Jenkins*, 639 F. Supp. at 44-45.

his findings to the need for high quality teachers and other instructional personnel: "In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators and *staff*." App. 90 (emphasis added). Judge Clark concluded his order by stating in the strongest terms why he was rejecting the State's drastic alternative:

> The State's proposal would cause severe harm to the desegregation effort. It is critical to the success of the desegregation plan that the employees who carry it out are compensated at or near the relevant market rates of compensation so that the District can attract and retain employees with the training and experience necessary to implement the Court's plan. A salary roll back would result in excessive employee turnover, a decline in the quality and commitment of work and an inability of the KCMSD to achieve the objectives of the desegregation plan. [App. 91.]

In early 1993, the AFT and KCMSD again developed separate proposals for salary relief. After a three-day hearing in June of 1993, Judge Clark characterized the evidence presented as "strikingly similar" to the last year's evidence on the salary issue. App. 95. He thus found no basis to alter his previous findings. He again expressly found that the "evidence presented at trial reaffirmed the position that the support personnel of the district are critical to the successful implementation of the desegregation program." App. 104. On the basis of the findings, he ordered continuing salary relief, which left District salaries "roughly competitive" to, but still as much as 7-28% below, salaries paid by competing school districts to teachers with comparable levels of experience and education. App. 102; AFT Exhibits 22, 23 and 24, Hearing of June 1, 1993.

The Court of Appeals affirmed both of the district court's orders approving salary relief as part of the desegregation plan, on two grounds. First, the court af-

firmed the district court's fact finding, based on the extensive evidence before it, that desegregation funding to maintain KCMSD salaries at or near market levels was "essential to comply with the court's desegregation order." App. 34. In addition, the Eighth Circuit reiterated its prior conclusion that the State's failure to remove the vestiges of the dual school system in KCMSD had contributed to the District's inability to raise sufficient funds to operate the school system, including paying adequate salaries. App. 26, 30-31.

The State also unsuccessfully sought rehearing or rehearing *en banc* of the salary issue. Again, not only was review denied, but even the dissenters from the petition for *en banc* review indicated that they would affirm the district court's orders concerning salaries for "teaching and direct educational support personnel" (about 80% of the salary relief). App. 57.

REASONS FOR DENYING THE WRIT

The Court should deny the petition in this case for three reasons. Petitioners' first stated issue is not raised by this case at all. The State claims that the decisions below create an arbitrary requirement of certain test score results as a prerequisite to a declaration of partial unitary status, when in fact the lower courts said no such thing. Rather, the courts below carefully applied the standards recently articulated by this Court in *Freeman*, 112 S. Ct. 1430.

Second, the decisions below rejected the State's argument for partial unitary status for reasons that are fact-specific. Indeed, the Eighth Circuit's decision held only that the State had failed to meet its burden of proving (1) that the vestiges of segregation addressed by the *Milliken II* relief in this case have "been eliminated to the extent practicable"; (2) that retention of judicial control of the educational improvement programs is

neither "necessary or practicable to achieve compliance with the decree in other facets of the school system"; and (3) that the State "has demonstrated a good faith commitment to the whole of the Court's decree." App. 19 (*quoting Freeman*, 112 S. Ct. at 1446). The State purports to raise issues challenging what it terms the "unprecedented educational, financial and physical resources that have been provided," to the plaintiff school children. Pet. i, 4-6, 12, 14-15. The majority of those resources, however, have funded a program of extensive capital improvements and a magnet school plan, which are not addressed at all in the orders under review. This Court denied certiorari seven years ago on the State's challenge to the district court's authority to order the capital improvements plan, 484 U.S. 816 (1987), and four years ago on the State's challenge to the scope and specific details of the magnet school and capital improvement plans. 490 U.S. 1034 (1989).

Finally, the salary relief ordered in this case presents no novel legal questions and rests on fact findings made and affirmed repeatedly over the last seven years. Since 1987, the lower courts have repeatedly found that to cure the vestiges of student segregation in KCMSD, the District must attract and retain employees competent to implement the court-ordered plan. The courts further found that in order to have such employees, salaries must be maintained near market levels and that the State's constitutional violations have restricted the District's ability on its own to produce revenues sufficient to meet its basic obligations (like paying adequate salaries) and to fund its share of the desegregation remedy. The State has not challenged any of the fact findings as clearly erroneous, and none of these fact-specific issues merits reconsideration by this Court.

I. THE PETITION PRESENTS NO NOVEL LEGAL ISSUE OR SPLIT AMONG THE CIRCUITS, BUT INSTEAD INVOLVES FACT-SPECIFIC ISSUES GOVERNED BY SETTLED LEGAL PRINCIPLES THAT THE COURTS BELOW CAREFULLY FOLLOWED

A. The Lower Courts Properly Applied This Court's Standards for the Determination of Partial Unitary Status and Did Not Create a Requirement of Certain Standardized Test Scores

This Court in *Freeman* authorized district courts to exercise their discretion to withdraw supervision from general areas of school district operations only where: (1) "the vestiges of past discrimination [in that area] have been eliminated to the extent practicable," 112 S. Ct. at 1446 (quoting *Dowell,* 111 S. Ct. at 638); (2) "there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn," *id.*; (3) "retention of judicial control is [not] necessary or practicable to achieve compliance with the decree in other facets of the system," *id.*; and (4) the defendant "has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Id.* The Eighth Circuit's decision recognizes each of these standards and correctly holds that the State failed to carry its burden of proof on three of these four issues. App. 19.

According to the State, however, the Eighth Circuit added a new requirement of "increased student achievement, as measured by results on standardized test scores" to these standards. Pet. 2. In fact, the panel opinion nowhere mentions the words "standardized test scores" or "test scores" and assiduously follows the analysis described by this Court in *Freeman.* The State itself manu-

factured the alleged student-achievement-as-measured-by-tests-scores standard—which it mentions no fewer than twenty times in its petition—out of one general sentence of dicta in the panel opinion. Pet. 8. Having rejected the State's partial unitary status argument because the record below demonstrated compliance, but failed to show that any of the other *Freeman* standards had been met, App. 19, the Eighth Circuit offered some further guidance to the parties:

> In view of the State's arguments that under *Freeman* it is entitled to a determination on an incremental basis that KCMSD had became unitary, *a few further words are appropriate.* . . . When the question of quality of education is reached the issue is far more complex. The district court correctly observed that implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent practicable. *The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation.* [App. 20-21 (emphasis *added*).]

The last sentence in the quoted passage, taken out of context, is the only textual basis for the State's extrapolation that the panel imposed an arbitrary test score standard for partial unitary status. Pet. 8. In contrast, the Eighth Circuit, in its later opinion denying rehearing *en banc,* expressly disavowed rigid reliance on test score results:

> Test scores, however, *must be only one factor in the equation* [for determining whether past discrimination has been remedied]. Nothing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs

should be ended by a declaration they are unitary. [App. 48 (emphasis added).][7]

A fairer reading of the Eighth Circuit's statement that the "success of quality of education programs must be measured by their effect on the students" is a reaffirmation of the well-settled principle that *effectiveness* in eliminating vestiges of discrimination is the standard to be employed in assessing a school desegregation remedy. *See Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971).[8] This Court held

[7] In explaining his reasons for rejecting the State's claim that these programs should be ended, Judge Clark did not focus primarily on test scores either. App. 11, 112-13. The district court, in its later order renewing the magnet plan for two years, found that KCMSD is still at a reduced level of student achievement "at or below national norms at many grade levels." The State overstates the context of this narrow factual finding; the State claims that "the [d]istrict [c]ourt had stated, in dictum, that . . . the KCMSD could not be declared partially unitary 'because the District is still at or below national norms at many grade levels.'" Pet. 8 n. 4. Judge Clark, however, did not link the test results below national norms with a failure to achieve partial unitary status, as the State implies. App. 131. Indeed, the State had not even argued that the magnet plan was partially unitary. The quoted finding was made in response to the *State's evidence* that the magnet plan had not resulted in sufficient progress to justify its continuation; "the studies conducted by the State are reliable but not to the extent necessary to draw the doomsayer's conclusions reached by the State with respect to the magnet program." App. 132.

[8] Moreover, there is no doubt in the lower courts that this well-settled principle applies to unitary status determinations. The Tenth Circuit agrees that *Freeman* and *Dowell* in no way suggest a "retreat from the principle that the measure of any desegregation plan is its effectiveness." *Brown v. Bd. of Educ.*, 978 F.2d 585, 588 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1993) (quoting *Davis v. School Comm'rs*, 402 U.S. 33, 37 (1971)). The Eleventh Circuit as well, in another post-*Freeman* decision, concurred that the defendant "has the burden of proving . . . that

early on in *Raney v. Board of Education*, 391 U.S. 443 (1968), and recently reaffirmed in both *Dowell* and *Freeman*, that a release of jurisdiction upon a showing merely that a school district adopted a remedial plan would "be inconsistent with the responsibility imposed on the district courts by *Brown II*." 391 U.S. at 449 (citations omitted).

The State relies on dicta from *Swann* to the effect that no "particular degree of numerical racial mixing" is required and suggests that effectiveness is not the appropriate standard. Pet. 14 (*quoting Swann*, 402 U.S. at 24). The State's quotation is accurate but irrelevant, because no particular degree of racial mixing or student achievement has been required here. The actual holding of *Swann* is far more instructive; this Court held that the district courts' limited reliance on mathematical ratios to address segregated student enrollment patterns was within its discretionary powers. "Awareness of the racial composition of a school system" was a useful starting point, the Court held, because ultimately a "remedial plan is to be judged by its effectiveness." *Swann*, 402 U.S. at 25. In this case, the lower courts have merely reiterated this standard; the remedial programs must "be measured by their effect," here their effect on both student enrollment and educational quality. App. 21.

The standard for judging a desegregation remedy is not, as the State suggests, merely whether the remedial plan violates or "fails to satisfy the Fourteenth Amendment," Pet. i, but whether it puts the victims of unconstitutional conduct as nearly as reasonably possible in the position they would have been but for the constitutional violation. Indeed, the "settled equal protection jurisprudence" that the State claims to marshal in support

it has eliminated the vestiges of its dual system to the extent practicable." *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1425 (11th Cir. 1992).

of its petition deals only with the question whether an injury sufficient to be the basis for liability under the Fourteenth Amendment has been alleged and not the distinct legal issue of whether adjudicated constitutional injuries have been cured to the extent practicable. *See* Pet. 13, 17-18, 21. The defendant seeking unitary status bears the burden of coming forward with evidence establishing that such injuries have been remediated to the extent practicable. *Freeman,* 112 S. Ct. at 1444-45.

As further demonstrated below, the State offered no proof that the *Milliken II* programs had succeeded in eliminating any of the vestiges of segregation found in this case—by any measure—and, therefore, the lower courts had no occasion to offer anything more than general guidance about what proof ultimately might be sufficient to establish that such vestiges have been removed. Moreover, the currently unpresented question of whether it might be appropriate *in this case* to require the defendants, as part of their obligation to eliminate the vestiges of segregation to the extent practicable, to raise the level of academic achievement in KCMSD would be *sui generis* because of the unique finding here of "a system wide *reduction* in student achievement" caused by the original constitutional violations. This unchallenged finding of an overall deterioration in the education of all children in the District ultimately may present the lower courts here with a more difficult factual question regarding the level of elimination of vestiges that is required and is practicable, than that posed in most other school desegregation cases. That issue, however, is simply not presented by the orders on review here. This Court, therefore, should not grant certiorari to review the State's hypothetical standardized-test-score requirement, which the lower courts did not impose.

B. The State Failed To Move the District Court for a Declaration of Partial Unitary Status or To Carry Its Burden of Proof on Several Critical Issues, and the Rejection by Both Lower Courts of the State's Argument on Those Fact-Specific Grounds Raises No Issue Meriting This Court's Review

As demonstrated above, the first issue raised by the State is a false one. What the State truly attacks are the findings that it did not carry its burden of proof with respect to the standards set forth in *Freeman.* But nothing in those findings presents an issue meriting this Court's review. The State cannot show—indeed has not even argued—why this Court should abandon its rule against disturbing the findings concurred in by both courts below.[9]

Moreover, this Court left no doubt that partial relinquishment of judicial control in a school desegregation case is only appropriate "where justified by the facts of the case." *Freeman*, 112 S. Ct. at 1445. The State, however, failed in the district court to move for a declaration of unitary status, to allege that this Court's standards for the partial relinquishment of judicial control were met, or even to try to carry its burden of proof with respect to those standards. Instead, the State argued below that the "establishment of the programs by compliance with the court order is all that is required." App. 19. The State limited its evidence to the fact that it had complied with prior court orders by providing part of the funds necessary to enable the District to purchase educational resources such as books, teachers, librarians, and counselors and to

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[9] This Court has repeatedly held that it will not disturb findings of fact concurred in by both a district court and court of appeals. *See, e.g., Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317 n. 5 (1985); *NCAA v. Bd. of Regents*, 468 U.S. 85, 98 n. 15 (1987); *Washington Area Transit Auth. v. Johnson*, 467 U.S. 925, 928 n. 5 (1984); *Rodgers v. Lodge*, 458 U.S. 613, 623 (1982). Here the district court and Court of Appeals have concurred in *all* of the relevant factual findings on both the *Freeman* issues and the salary relief at least *twice*.

offer educational programs such as early childhood and summer school. The State also compared the resources provided in KCMSD to several neighboring school districts. However, the State presented no evidence that the programs were effective to eliminate the harms that they were designed to address.

The State misses one of the fundamental tenets of school desegregation law reaffirmed by this Court in both *Freeman* and *Dowell*. Defendants in school desegregation cases have an affirmative duty to remedy their constitutional violations by eliminating the harms that they have caused:

> The district court should address itself to whether the Board ha[s] complied in good faith with the desegregation decree since it was entered, *and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable*. [*Freeman*, 112 S. Ct. at 1446 (quoting *Dowell*, 111 S. Ct. at 638) (emphasis added).] [10]

The State, however, did not even allege, let alone attempt to prove, that the educational harms or racial isolation caused by State-mandated segregation in the KCMSD had been eliminated to the extent practicable.[11] The State's evidence did not mention the "system wide *reduction* in student achievement," the "low achievement" among

[10] *See Freeman*, 112 S. Ct. at 1443 ("duty . . . to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system"), *id.* at 1445 ("end purpose must be to remedy the violation"); *Board of Education of Oklahoma City v. Dowell*, 498 U.S. 237, 249-50 (1991) ("District Court should address . . . whether the vestiges of past discrimination had been eliminated to the extent practicable").

[11] Unquestionably, the *Milliken II* programs in this case are designed to address the legacy of segregation in both of these areas. *See e.g., Jenkins*, 639 F. Supp. at 24, 27, 29, 31 (educational programs ordered in part to remedy educational harms). *See also id.* at 27, 29, 31, and 35 (educational programs ordered will help in "attracting and maintaining non-minority student enrollment").

minority students, the "general attitude of inferiority among blacks," or the level of racial isolation in KCMSD. *See supra*, page 3. Indeed, despite claiming partial unitary status under *Freeman*, the State objected (unsuccessfully) to the *relevance* of the evidence presented by the District concerning the levels of racial isolation and academic achievement in KCMSD. Because it so completely misunderstood *Freeman*, the State made no record that would allow this Court a meaningful review of whether the KCMSD is partially unitary. Even the dissenters from the denial of rehearing *en banc* noted that is "still an open question on the record before us today." App. 58.

The State confuses the issue in telling this Court that "no party contested the State's showing that the overall quality of education programs the KCMSD offered was equal to or better than analogous programs offered in any surrounding Missouri suburban school district." Pet. 14.[12] First, the State made no such showing; its evidence addressed the level of certain basic resources but did not address the "quality" of the programs offered in any other way. Indeed, while the State has fully accredited *all* of

[12] Likewise, the State repeatedly quotes the district court's statement that the KCMSD has "facilities and opportunities not available anywhere else in the country," *see, e.g.*, Pet. i, and claims that it is a factual finding of the district court. Ironically, unlike the lower courts' actual findings, which undercut the State's claimed legal issue so completely, this statement is unsupported by any evidence in the record. This statement is hyperbole used by the district court in the midst of a passage aimed at encouraging the non-party City government to do more to provide security for KCMSD's buildings and equipment. There was no evidence submitted to the court, however, comparing these physical facilities to those in McLean, Virginia or any other school district in the nation, and this discussion does not refer to the educational programs at issue here at all. App. 115. The State's characterization of this statement as a "finding" based on "uncontroverted evidence" about the district court's "standards" concerning education quality being "vastly exceeded", Pet. 7, is totally without foundation.

the other ten school districts in the Kansas City area that it has evaluated—based on the level of educational resources they provide as well as other measures of the quality of their programs—it has only provisionally accredited KCMSD, the State itself finding significant deficiencies in educational quality measures. Second, KCMSD's evidence clearly showed that, while the District has improved its educational quality and desegregation levels, more progress is necessary to put the victims of segregation in the position they would have been but for the constitutional violation. App. 112-13, 131. The District's evidence included, among other things, statistics on student enrollment and historical data on student performance according to a number of indicators.

The State's Petition itself repeatedly betrays the fact-specific nature of the decisions below and the inadequacy of the record below for review of the question that the State asks this Court to consider. For example, the State argues that reliance on student outcomes to assess whether vestiges of segregation have been eliminated to the extent practicable is "[f]actually . . . untenable because factors outside the control of government and unrelated to *de jure* segregation dramatically affect student achievement." Pet. 19. The State, however, failed to present a scintilla of evidence to the district court about what factors in the KCMSD, unrelated to past discrimination, have contributed to disappointing student performance or continuing racial isolation. In essence, the State seeks through law review articles cited to this Court to make the record it failed to make below. Pet. 20 n.10.

This is not a case, therefore, like *Freeman*, where a defendant has proven that the condition adversely affecting the plaintiffs was caused by factors outside its control. Just as demographic changes in DeKalb County, Georgia, contributed to ongoing racial imbalances in public school enrollments, 112 S. Ct. at 1438, social and economic forces in Kansas City, Missouri *may* contribute to educational problems in KCMSD, but whether they are now the cause of low student achievement, continued racial

isolation, or other conditions previously found to be vestiges of segregation are questions of fact not yet considered by the courts below. The State, which bore "the burden of showing that any current [harm] is not traceable, in a proximate way, to the prior violation," 112 S. Ct. at 1447, did not present any proof on this issue.

The spectre that the State conjures up of a potentially perpetual remedy need not inhibit the denial of review of these fact-bound issues.[13] Despite the district court's finding that the remedy has not yet succeeded in eliminating the vestiges of segregation to the extent practicable, it already has directed the parties to plan for the operation of the KCMSD when the defendants are released from court jurisdiction. App. 140-141. Recognizing the unique issues presented by the District's financial situation and the significant progress of the remedy to date, the district court has ordered the parties to consider effective methods for funding KCMSD once the vestiges of segregation are eliminated to the extent practicable and court jurisdiction ends. *Id.* Proceedings are in progress in the district court analyzing the implications of a KCMSD financial plan, assuming withdrawal of court-ordered funding at alternative intervals of three, five, seven or ten years. App. 141.

This State also challenges the determination of the courts that it is necessary for the district court to retain jurisdiction over the educational programs that the State claims are unitary in order to ensure compliance with the court's decree in other areas that the State concedes are not. App. 19. This issue too does not merit this Court's review. As this Court has recognized, "[t]wo or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area

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[13] The State claims that a KCMSD administrator "endorsed" a 100-year remedy, Pet. 22, where in fact the witness testified in response to a series of leading questions on cross examination simply that the length of time was less significant than whether the violation had been cured.

cannot be eliminated unless the judicial remedy addresses other matters as well." *Freeman*, 112 S. Ct. at 1449 (citations omitted). The voluntary remedy here, premised on desegregating student enrollment by improving educational quality, is the quintessential example of such synergism. It makes no sense to consider eliminating the *Milliken II* relief ordered in this case while vestiges of segregation in student enrollment persist; these educational programs are the foundation of the magnet school plan and the cornerstone of the overall plan to remedy the vestiges of segregation. *See, e.g.*, 639 F. Supp. at 27, 29, 31, 35 (importance of remedial education components "to attracting and maintaining, non-minority student enrollment"). The State's evidence, for example, failed to suggest how the magnet school plan could possibly be effective in attracting non-minority students to KCMSD if the District's class sizes increased substantially, as the State proposed. Judge Clark has found and the Eighth Circuit confirmed that the remedial programs form an integrated whole and eliminating any one would have serious consequences for the others. App. 112, 19. Thus, even if the lower courts had misapprehended this Court's guidance concerning the elimination of the vestiges of past discrimination in the area of educational quality or if the State had proved that no such vestiges remain—neither of which occurred—this case would not merit review because the State clearly failed to meet this independent requirement for partial unitary status.

Similarly, the State failed to allege or prove that it "has demonstrated a good faith commitment to the whole of the court's decree." App. 19 (citing *Freeman*, 112 S. Ct. at 1446). The Tenth Circuit recently elaborated *Freeman*'s good faith requirement:

> Mere protestations of an intention to comply with the Constitution in the future will not suffice. Instead, specific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith. [*Brown*, 978 F.2d at 592.]

Indeed, in *Freeman* itself, despite favorable findings by the district court about the defendants' dedication to the remedial effort, this Court suggested that "further proceedings" would be appropriate to determine whether there is "an affirmative commitment to comply in good faith with the entirety of a desegregation plan." 112 S. Ct. at 1450. The Eighth Circuit's decision here, however, was far easier, for the State did not even offer "protestations of an intent to comply in the future." Here, the State has consistently opposed and continues to oppose, often on contradictory grounds, virtually every aspect of the remedy in this case. The only component of the remedy for which the State is principally responsible, voluntary interdistrict transfers, has never been implemented on a meaningful scale. App. 20 n.10. In this Petition, the State argues that, with the task of desegregation in student enrollment admittedly incomplete and without regard to whether educational harms remain unremedied, its responsibility to help to fund hundreds of teachers, librarians and counselors and programs like full-day kindergarten and summer school should end because it has complied with certain of the court's orders for several years. It offered no proof whatsoever in the district court that might establish its good faith intentions to go forward on a more constructive basis.

II. THE COURT SHOULD NOT REVIEW FACTUAL CONCLUSIONS—CONCERNING THE NECESSITY OF THE SALARY RELIEF ORDERED IN THIS CASE TO THE SUCCESS OF THE REMEDY AND CONCERNING THE EFFECTS OF THE STATE'S CONSTITUTIONAL VIOLATION ON LOCAL SCHOOL DISTRICT REVENUES—THAT HAVE BEEN FINALLY RESOLVED AGAINST THE STATE IN EARLIER PROCEEDINGS

The State argues that this Court should review the Eighth Circuit's decisions affirming the district court's 1992 and 1993 salary orders because they are allegedly contrary to *Milliken II*, 433 U.S. 267, for two reasons: the State argues that court-ordered salary relief allegedly is not

tailored to correct the vestiges of segregation; and they argue that there was no showing that low salaries were directly caused by the State's constitutional violation. Pet. 24. Contrary to the State's argument, the lower courts' decisions do not conflict with *Milliken II* or any other precedent because the salary relief ordered is supported by findings of fact and substantial record evidence demonstrating that salaries near market levels are necessary to allow KCMSD to implement the desegregation remedy and that the District's inability to produce revenue sufficient to fund its basic operations (including salaries) was caused in part by the State's constitutional violation.

Desegregation funding for KCMSD salaries has been a long-standing component of the desegregation remedy; on no fewer than four separate occasions over the past seven years the lower courts have concluded that this relief was necessary to remedy the constitutional violations in this case. The district court first ordered such relief in 1987. While the State appealed other aspects of the same order, it did not challenge the court's approval of desegregation funds to bolster KCMSD's ability to attract and retain qualified employees to implement the court-ordered plan. In approving a settlement continuing such relief in 1990, Judge Clark again found, based on the evidence submitted during four days of testimony prior to the settlement, that maintaining adequate salaries was "essential to comply with the court's desegregation orders." July 23, 1990 Order at 6. Again in 1992, after a four-day hearing, the district court found that without continuing salary relief KCMSD would "not be able to implement" the desegregation plan. App. 86. On appeal, "[t]he State [made] no claims that the district court's findings of fact [were] clearly erroneous," App. 23, and the Eighth Circuit affirmed. App. 26-27. Again in 1993, the district court took extensive evidence and again concluded that salary relief was "a necessary component of the desegregation program." The Eighth Circuit again affirmed this finding. App. 31. There is no basis for granting certiorari

now to review this unchallenged finding, which is dispositive of the State's second stated issue.[14]

The State attempts now to turn this long-resolved, fact-specific issue into an error of law. Pet. 23-24. The State claims there is no "legal basis" for allowing desegregation funds to be used to pay salaries for "non-instructional personnel." Pet. 25. The principal legal basis for such relief, however, just like that for paying adequate salaries to teachers, is its necessity to "remedy the vestiges of segregation" in KCMSD. App. 23. The lower courts have repeatedly found that maintaining adequate salaries is essential to recruiting the personnel needed to implement the remedy and, on the basis of extensive evidence, rejected the State's purported distinction between instructional and non-instructional personnel. App. 90, 104. The State now seeks to transform this narrow factual dispute, which it lost twice below, into a legal issue meriting this Court's review. It is not.

The unique funding arrangement for this remedy, affirmed by this Court, also underscores both why the salary relief ordered in this case was necessary and why it poses no significant legal question meriting this Court's review. As this Court has recognized, by 1987, when the district court first ordered salary relief in this case, "it was clear that KCMSD would lack the resources to pay for its . . . share of the desegregation cost." 495 U.S. at 41. As a result, the lower courts have approved tax increases to fund KCMSD's share of desegregation costs and this Court has affirmed such extraordinary measures in the unique circumstances of this case. *Id.* However, this tax increase, whose proceeds go to the District's desegregation

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[14] *See supra* note 9. This Court also has repeatedly stressed the considerable deference owed to the lower courts' exercise of their equitable powers to remedy past discrimination because they have "firsthand experience with the parties and [are] best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 6).

budget, has left the District's regular operating budget capped at a rate about one-half that of surrounding districts. This unique circumstance—with which, after countless days of testimony, Judge Clark is intimately familiar—makes it impossible for KCMSD to pay salaries anywhere near market levels without using "desegregation" funds. This unusual situation, already once reviewed by this Court, is yet another reason this case does not again merit reconsideration.

Finally, the petition simply ignores the Eighth Circuit's other independent and fact-specific basis for affirming the salary relief. KCMSD's inability to produce adequate revenue to support its basic operations (including adequate salaries) was caused in part by the State's constitutional violation. App. 26, 30. The lower courts have concurred in this finding three times. App. 26, 30; 855 F.2d at 1305. Thus, the State is incorrect in claiming that the lower courts have not found "that low district-wide salaries . . . flow from any earlier constitutional violation by the State." Pet. 24. The district court found and the Court of Appeals agreed that KCMSD's inability to raise the funds necessary to provide adequate salaries by itself was in part the result of the State's constitutional violation. Again, the State does not contend that this Court should disturb these findings.

The truth of the matter is that the salary orders before the Court are concerned almost exclusively with the complex details of how to maintain a staff adequate to the challenge of implementing a voluntary desegregation plan in a school district physically, fiscally and educationally ravaged by decades of State-mandated segregation. The working out of these details is committed to the fact-finding authority and sound discretion of the lower courts. Nothing in these orders presents an important issue of law for this Court's consideration.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI, *et al.*,

Petitioners,

v.

KALIMA JENKINS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF OF RESPONDENTS JENKINS *ET AL.* IN OPPOSITION TO CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

1. Whether, in a school desegregation case, the lower courts erred by requiring defendants – whose constitutional violations were found to have segregated schools and reduced student achievement – to implement educational improvement programs for a period of time sufficient to reduce the educational vestiges of segregation to the extent practicable.

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BRIEF OF RESPONDENTS JENKINS *ET AL.* IN OPPOSITION TO CERTIORARI

COUNTER-STATEMENT OF THE CASE

A. Introduction

Two years ago, this Court established a clear standard to govern the termination of remedial orders in school desegregation cases. The standard focused on the elimination of the vestiges of discrimination to the extent practicable. *Freeman v. Pitts*, 112 S. Ct. 1430, 1446 (1992). Petitioners' officials of the State of Missouri, have never moved the district court to adjudicate their compliance with the *Freeman* standard. In their petition, they do not discuss the widespread constitutional violations the district court found they committed. They do not mention

the pervasive effects of those violations on school segregation, school quality, and school children, found by the district court. They do not fairly describe the carefully phased plan the district court ordered to eliminate those effects to the extent practicable, nor the plan's encouraging but still partial achievement of its remedial goals, nor the additional progress the district court has found to be practicable, nor the planning the district court has required in anticipation of unitary status. Instead, having failed even to attempt to satisfy the *Freeman* test, petitioners ask the Court to replace it with one the Court rejected in *Freeman*, which would treat the instant the entire plan has gone into operation as the moment the district court's authority to monitor the practicable effect of the plan ceases. *Cf. id.* at 1439.

Certiorari is inappropriate here for three reasons. First, the Court recently resolved all the legal questions presented by this case with *Freeman's* adoption of standards generally thought to be favorable to litigants in petitioners' position. And, petitioners have never claimed that they, as yet, can satisfy those standards. Second, the asserted legal issue involving a remedial standard that depends on the achievement of particular test scores is not presented by this case and is based entirely on petitioners' mischaracterization of statements by the courts below. In fact, those statements did nothing more controversial than impose on the district court the obligation to consider all available evidence – including but not limited to indications of educational improvement – in determining whether the educational-harm vestiges of petitioners' century-long violation have been eliminated to the extent practicable. Third, the issue involving funding for teacher salaries asks the Court to intervene in a complex and situation-specific detail of the remedy without acknowledgement of the clear linkage of this aspect

of the remedy to the particular and unique violation found by the courts below, that violation's specific and unique effects, and the inextricable connection (also explicitly detailed in the findings below) between this aspect of the remedy and other aspects that petitioners do not challenge and acknowledge are still necessary.

Because "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation[s]," *Milliken v. Bradley*, 433 U.S. 267, 280 (1977), and because petitioners do not give an accurate picture of the violations, its effects, *or* the remedy,[1] respondent schoolchildren briefly recount the lower courts' violation and effect findings, the extensive record evidence supporting them,[2] the remedy ordered to eliminate the effects where practicable, and the progress towards the remedial goals that has and has not yet been achieved since the remedy went into effect.

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[1] This Court has never reviewed the violations. Previously, the Court declined to review the schoolchildren's petition seeking a broader, interdistrict remedy, *Jenkins v. Missouri*, 484 U.S. 816 (1987), and the State's petition seeking a narrower remedy, 490 U.S. 1034 (1989). This Court has reviewed issues of attorneys fees, 491 U.S. 274 (1989), and funding the remedy, 495 U.S. 33 (1990).

[2] In the course of deliberating on the violations, their effects, and the remedy, the district court has heard evidence from more than 350 witnesses over 160 days, producing a transcript exceeding 60,000 pages; has received more than 80,000 pages of documentary evidence; and has written hundreds of pages of findings and conclusions. *Jenkins v. Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984); *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985, 1986); *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987). These findings were affirmed by the court of appeals. *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (en banc); *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988); *Jenkins v. Missouri*, 904 F.2d 415 (8th Cir. 1990).

B. Overview of the District Court's Findings

Respondent schoolchildren begin by summarizing the district court's violation and effects findings and the remedy it has ordered. In Section C, respondents provide additional detail illustrating the magnitude of the violations and their effects and the scrupulous care with which the district court crafted a remedy for those violations pursuant to standards set by this Court.

* * *

For a century after the Civil War, Missouri racially segregated its schools. The district court found that every "school district in Missouri participated in this dual system," and that the State's intentional segregation of "access" to schools and especially school districts (all but a handful of which were maintained as all-white) had the effect of concentrating blacks within the Kansas City, Missouri School District ("KCMSD"). 593 F. Supp. at 1490.

The court found that Missouri and the KCMSD continued segregating schools and districts in the decades after *Brown v. Board of Education*, 347 U.S. 483 (1954). For example, after the KCMSD could no longer expressly exclude blacks from particular schools, it repeatedly rearranged attendance zones to keep white and black children from attending school together. 593 F. Supp. at 1493. Likewise, when the U.S. Department of Health, Education, and Welfare required KCMSD to desegregate its teaching staff in the 1970s, the district transferred its best and most experienced teachers to white schools, leaving less capable teachers in black and integrated schools. Tr. 3,298-99, 3,304-06. When schools became identified as black, college preparatory classes, especially in math and science, were discontinued and replaced by vocational courses in such subjects as "janitorial services." Tr. at 7018-21, 7338-41, Stip. 75.

The district court detailed the devastating effects of the State's concentration of nearly all black students in the KCMSD, the KCMSD's operation of inferior black schools for a century, and its continued identification of black schools as inferior in the decades after *Brown*. The district court found an "abundance of evidence" that these violations caused white flight to the suburbs. 672 F. Supp. 412. In particular, the State's identification of the KCMSD as the district in the region for blacks, and KCMSD's policy in the decades following *Brown* of causing an ever-increasing segment of its schools to be identified as inferior schools for blacks with substandard teachers, facilities, and curricula, directly "led to white flight from the KCMSD to suburban districts [of a] large number of students . . . " Order, August 25, 1986.

The district court further found that the State's and the KCMSD's pre- and especially post-*Brown* violations, and the white flight the violations caused, created significantly "inferior education" in the district, an "attitude of inferiority among blacks [which] produced low achievement [and] which ultimately limits employment opportunities and causes poverty," 593 F. Supp. at 1492, and "a system-wide *reduction* in student achievement in the schools of KCMSD." 639 F. Supp. at 24 (emphasis in the original). The district court found that the effects of segregation, and particularly the identification of the district's schools as educationally inferior and the "white flight" from those schools, "contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools," 672 F. Supp. at 403. As a result, school facilities within the district "literally rotted," *id.* at 411, further diminishing the levels of educational attainment among students in the district and exacerbating white flight. *Id.* at 403.

To eliminate the effects of these violations, the district court designed a remedial plan with four interconnected parts – educational improvements, capital improvements, voluntary desegregation via magnet schools, and voluntary interdistrict desegregation to be worked out by the State between the KCMSD and suburban school districts that wanted to participate. Petitioners here challenge a few aspects of only the first component of the four-part plan.

The district court designed the educational-improvements component of the remedy with the explicit goal of remedying, to the extent practicable, the "inferior education indigenous of the state-compelled dual school system" in the KCMSD, 593 F. Supp. at 1492, and the "system wide *reduction* in student achievement in the schools of the KCMSD" caused by the dual system, 639 F. Supp. at 24 (emphasis in original). On appeal of the educational improvements portion of the remedy, petitioners primarily challenged the division among the various defendants of the financial obligations for these programs. 807 F.2d at 682. All educational programs were affirmed in 1986 and 1988. Petitioners did not seek certiorari to review the programs it challenges here.

C. The Specifics of the District Court's Findings and of the Supporting Evidence

1. Pre-1954 Violations and Effects

From 1865 through 1976 Missouri's Constitution required "separate" schools for "children of African descent," and, from 1889 to 1954, the State enforced that provision with statutes making it a criminal offense for "any colored child to attend a white school." Mo. Const. 1945, art. 9, § 1(a). 1889 Mo. Laws 226, expanded in 1909 Mo. Laws 770, 790, 820 to forbid racial integration of even private schools. *See generally Adams v. United States*, 620

F.2d 1277, 1280-81 (8th Cir. 1977) (adopted by reference 593 F. Supp. at 1490).

Unlike other southern states that mandated school segregation, Missouri did not organize its schools into large, county-wide districts. Instead, like most northern states, Missouri distributed its schoolchildren among a vast number of small school districts – over 8,000 in 1948 compared to 546 today. P.Ex. 212. Because Missouri's schools districts were mainly small and poor, they reserved their limited facilities for white children and required black children to seek an education outside the district – almost always without reimbursement for tuition and transportation.[3] As state school superintendents repeatedly reported, blacks were "so widely scattered that it [was] impossible to collect them in sufficient number to warrant the expense of a school" (P.Ex. 208), and the typical "school board [was] not interested in assisting these negro children". P.Ex. K30. *See* 593 F. Supp. at 1490. As a result, school segregation was "driving these people to towns in order to educate their children."[4] P.Ex. K28.

Citing this and other evidence, the district court found "an inextricable connection between schools and housing in the Kansas City area." Because black

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[3] *Board of Educ. v. St. Louis*, 149 S.W.2d 878 (Mo. 1941) (school districts not required to pay for inter-county transfers).

[4] Before 1931, none of the 55 school districts in the three counties around the KCMSD with black students provided any schools or reimbursement for tuition or transportation to KCMSD schools; in 1931, one district started doing so; by 1945 only one other district was doing so; and as late as 1953, after extensive "separate but equal" litigation in the state, still only five districts made such reimbursements. During much of that time, KCMSD tuition amounted to one-fourth of the annual income of an average black family. Tr. 4313-4, 5355-8.

" '[p]eople gravitate[d] toward school facilities,' " the " 'location of [black] schools . . . influence[d] the patterns of residential development of [the] metropolitan area and ha[d] important impact on composition of inner city neighborhoods.' " 593 F. Supp. at 1491 and Order of June 5, 1984 at 101 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 20-21 (1971)). Access to schools accordingly was a "major factor" in the sharp decline in the black population in the areas surrounding the KCMSD and the exponential growth in the KCMSD's black population before and after *Brown*.[5] 593 F. Supp. at 1490 (citing Tr. 16,693) (lack of schools for blacks prompted the "depletion of black people from surrounding towns" and their movement into Kansas City). "Undeniably," "blacks moved" out of districts that did not "maintain the state-required separate schools [for blacks] . . . to districts, including the KCMSD, that provided black schools." 593 F. Supp. at 1490.

The district court found that the "intensity" of the "segregation" caused by the violations "is demonstrated by the fact that the average black family [in Kansas City] lives in a census tract that is 85% black while the average white family [in the suburbs] lives in a census tract that is 99% white." *Id.* at 1491.

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[5] Although 21% of black families in the 3-county area lived outside the KCMSD in 1900, that proportion had fallen to 3% by 1954. P.Ex. 53E. Petitioners' own expert demographer demonstrated how school segregation not only drove blacks from nearby rural and suburban areas to the KCMSD but also funneled into that district nearly all of the black families migrating into the metropolitan region from elsewhere. *See* Tr. 22,076, 22,091 (the "existence of a core of blacks caused by [governmental segregation] in the Kansas City area would have long lasting effects [because] . . . blacks tend to move short distances from the core . . . and in-migration [of blacks] tends to focus on that black core as a result of . . . informational networks").

2. Post-1954 Violations and Effects

After ninety years of vigorous criminal and civil enforcement of school segregation prior to 1954, Missouri informed local school districts six weeks after *Brown v. Board of Educ.*, 347 U.S. 483 (1954), that they henceforth could make their own decisions about whether, where, and how to educate black students. The State explicitly refrained from requiring desegregation or from ruling that segregated schools are unlawful. P.Ex. 2322 (June 30, 1954 opinion of the Missouri Attorney General).

During the thirty years following *Brown*, segregation continued and increased within the KCMSD.[6] During this period, the KCMSD:

- gerrymandered attendance zones block by block – changing boundaries three hundred times – to assure that the district's black population remained in all-black attendance zones;
- turned schools from all-white to nearly all black in a single year;
- explicitly segregated classrooms within potentially integrated schools by requiring black schoolchildren to walk to the overcrowded elementary school near their home from where they and a black teacher were bused to an under-utilized white school where they were given their own classrooms and their own separate recess and lunch periods;
- encouraged whites in racially transitional schools to transfer to all-white schools;
- consistently selected segregative sites for new schools;

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[6] When this action was filed in 1977, 25 of the pre-1954 one race schools remained 90% or more of the same race and 80% of all blacks in Kansas City attended schools that were 90% or more black. *Jenkins*, 593 F. Supp. at 1492. At trial, in 1984, 24 schools had 90% or more black students, compared to 14 in 1954. *Id.*

- racially targeted faculty assignments; and
- replaced math and science courses in previously all-white schools with courses, for example, in "janitorial services" for the black children newly segregated in those schools (593 F. Supp. at 1493-4. *See also* Ex. K2; Tr. 7018-21, 7338-41, 8624-5, 8969-71, 9419-20; Stipulation 75 of February 21, 1984.).

The district court found that there were substantial and direct demographic effects of branding African-American children as unfit classmates (or even recess- or lunch-mates) and making the education offered blacks in black schools inferior, at the same time as the KCMSD caused an expanding proportion of its schools to be identified as black. While blacks perforce remained segregated in schools in KCMSD, the State's and KCMSD's violations "led to white flight from the KCMSD to suburban districts, [a] large number of students leaving the schools of Kansas City . . . " Order, August 25, 1986 at 1; *See* Tr. 8715-6, 8721-30, 9228-32, 9235 (cited at 593 F. Supp. at 1494); Tr. 17,314-16 (admission by Missouri that KCMSD underwent rapid transformation as "whites fled the district").

The district court also found that Missouri:

- enforced racially restrictive covenants until five years after *Shelley v. Kraemer*, 334 U.S. 1 (1948);
- "encouraged" a racially segregated "dual housing market" in the 1950s - 1970s through a number of discriminatory programs and activities operated by its housing and insurance agencies; and
- explicitly racially segregated relocations of persons displaced by highways and urban renewal programs during the same period (593 F. Supp. at 1491, 1497, 1501-1503).

Together with the State's history of discriminatory actions in regard to schools, housing, marriages and other practices, and KCMSD's continuation of its segregative school

policies in the 1950s, 1960s and 1970s, these specific actions by state agencies within the Kansas City area further segregated schools and "created an atmosphere in which private white individuals could justify their bias . . . against blacks." *Id.* at 1503.

The district court found that the violations caused "inferior" education, *id.*, at 1492, "a system-wide *reduction* in educational achievement, 639 F. Supp. at 24, a decline in the district's educational rating to the lowest in the area, *id.* at 26, system-wide racial isolation of great "intensity", 593 F. Supp. at 1491, and widespread white flight. Order, August 25, 1986, at 1-2. In addition, the court found that the violations diminished the district's financial base. As "many residents of the KCMSD left the district and moved to the suburbs" with their children, the KCMSD was left with a white voting majority that was without children or was unsupportive of the district's mainly black student population and that for nearly two decades "refused to approve a tax levy increase and a bond issue." 672 F. Supp. at 412. As a consequence, the district's schools "literally rotted." *Id.* at 411. As the court of appeals determined, "[t]he findings of fact demonstrate a spiraling effect of white children leaving the KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." 855 F.2d at 1305. Missouri did not appeal these findings.

To remedy the violations and effects, the schoolchildren and the KCMSD proposed a mandatory inter-district plan that would have consolidated or required inter-district transfers between the 75%-black KCMSD and the predominately white surrounding school districts. Plan For Remedying Vestiges, docket no. 1046. Although the plan would have avoided many of the most

expensive educational improvements, capital improvements, magnet, and other components of the remedy eventually ordered, the district court rejected plaintiffs' inter-district proposals. The court did so based on the State's opposition and the court's conclusion that Missouri, and not the suburban school districts, was responsible for the violations' effects in the suburban districts. 593 F. Supp. at 1488; Order, January 25, 1985. An equally divided en banc court of appeals affirmed the denial of interdistrict relief, 807 F.2d 657 (8th Cir. 1986), and this Court denied the schoolchildren's petition for certiorari. 484 U.S. 816 (1987).

3. The Ordered Remedy

In devising an intradistrict remedy the district court followed two legal standards – that " 'the scope of the remedy is determined by the nature and extent of the constitutional violation,' " and that the goal of a remedy is to prohibit new violations and eliminate the "vestiges of state imposed segregation." 639 F. Supp. at 23 (citing *Milliken v. Bradley*, 418 U.S. 717, 744 (1974)). Having rejected plaintiffs' request for a remedy involving mandatory interdistrict busing or consolidation and Missouri's suggested remedy requiring children to be bused from one part of the 75%-minority KCMSD to another, the district court in 1985 ordered a plan aimed at achieving two goals: (i) removal to the extent practical of the educational deficits to which the State's intentional segregation had subjected black children in the KCMSD and (ii) voluntary integration efforts aimed at reversing some of the

racially segregative effects of the State's violations. *See* 639 F. Supp. 19.[7]

In order to eliminate the educational deficits suffered by black children in the KCMSD, the court directed the district to implement plans to provide small classes, early childhood education, before and after school tutoring programs, summer school, full day kindergarten, library services, and to institute other remedial programs. The court found that such measures were necessary to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 23.

To reduce the racial isolation of KCMSD's black children, the court directed the State to seek the voluntary participation of surrounding districts in a transfer program by which KCMSD's minority students could volunteer to attend school in cooperating school districts nearby.[8] *Id.* at 38. In a survey ordered by the district court, thousands of KCMSD's black families expressed an interest in transferring their children out of the KCMSD to suburban schools. Facilitating such transfers would "provide additional opportunities for desegregated schools [within the KCMSD] as well as desegregative educational experiences for KCMSD students [in surrounding districts]." *Id.* Educating KCMSD's black students in existing classrooms in surrounding districts to

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[7] Two consecutive orders are reported together at 639 F. Supp. 19. The initial remedy order of June 14, 1985 appears at 639 F. Supp. 19-46, *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert denied*, 484 U.S. 816 (1987). A later order appears at 639 F. Supp. 46-56 (June 16, 1986), *aff'd*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied in rel. part*, 490 U.S. 1034 (1989).

[8] The City of Kansas City includes all or parts of 13 school districts, including the KCMSD. A dozen other districts are nearby.

which the State's violations previously had propelled the district's white students would have avoided some of the expense of renovating KCMSD's deteriorated schools and of installing costly magnet facilities in the KCMSD to attract white students back from the surrounding districts. 855 F.2d at 1302 (citing Order, November 12, 1986).

Missouri failed to develop a meaningful voluntary transfer plan. In 1986, the court admonished the State for its inaction. 639 F. Supp. at 51. In 1990, after continued inaction by the State, the court of appeals ordered submission of a transfer plan. 904 F.2d at 419. The plan submitted in 1990 resulted in ten KCMSD black students transferring to a single suburban district. App. 20 n.10.

Missouri did not appeal the district court orders to implement the educational remedies, and only appealed the district court's allocation to it of a proportion of the cost of three of the educational programs. *Jenkins*, 807 F.2d at 684. The court of appeals affirmed. *Id.* at 686.

4. Effect of the Remedial Programs

The educational programs, implemented in phases, were fully in place by the fall of 1988. Magnet programs began in various schools in 1986, spreading a grade at a time thereafter, and will be fully implemented in all grades for the first time in 1994-95. The ordered capital improvements are about 70% in place, with several new facilities nearing completion and scheduled to open in 1995. The only component of the remedial plan that has not been substantially implemented is the one for which Missouri was given primary responsibility – voluntary transfers of minority children to suburban schools.

Some meaningful progress has been made in reversing the system-wide reduction in student achievement. In most subject areas at most grade levels, scores on standardized tests have increased. From 1986 to 1992 (the last

year in which data were available to the district court) test scores in reading, language arts and math increased on 25 out of 33 points of comparison, with increases averaging about seven percentile points. App. 131 (finding "trend of improvement in academic achievement"). Other statistical measures of educational progress, including attendance, persistence to graduation, and suspension rates showed modest improvements in recent years.

The academic improvement is notable especially in the earlier grades (K-5) where students scored at or above the 50th percentile on all 25 points of comparison. According to experts for the KCMSD, this trend may be a result of the fact that the district's youngest children – who alone have benefited from the educational programs throughout their school careers – have developed good learning habits, experienced good teaching, and enjoyed school. *Id.* at 129.

In addition to improving statistics, the plan's educational components have improved the lives of individual children. Last year an African-American male graduate of Kansas City's college prep magnet school was awarded Rhodes and Marshall scholarships. An African-American female, currently a senior at the arts magnet school, won the English Speaking Union's Shakespeare contest at Lincoln Center in New York City. Other students have been awarded scholarships at major colleges and universities or received appointments to the service academies, achievements unknown to Kansas City graduates in the two decades and more since the system-wide reduction in student achievement occurred as a result of the constitutional violations in this case. *See, e.g.* KCMSD Ex. 33 (January 27, 1993).

Many KCMSD black children have not yet experienced academic improvements of lasting benefit, however. About a quarter of KCMSD's students remain among the lowest achieving students in the nation. KCMSD Exs. 28A, 28B (January 27, 1993). While improved, the persistence to graduation rate remains low, with substantial numbers of high school students dropping out before graduation. Following hearings, both courts below found that academic improvements remain practicable for these children. The district court found that, although "there has been a clear trend of improvement in academic achievement in the KCMSD, . . . the District has [not] reached anywhere close to its maximum potential" on that aspect of the remedial goal. App. 131. The district court also found that

> the *Milliken II* [*i.e.*, educational improvement] components have been partially successful in implementing the goals and standards of the desegregation remedy. However, these components have not yet met these goals in their entirety. The court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time.

App. 112-13. The court of appeals affirmed this finding because "evidence in the record fell far short of establishing that [the educational harm] vestiges had been eliminated to the extent practicable." App. 19. The district court also found that maintaining at least the existing levels of educational achievement within the KCMSD is critical to the success of the plan's programs to remedy the racial-isolation effects of the violations within the district.

Meaningful progress has been made in eliminating racial isolation in Kansas City schools. In 1985-86, before the magnet school programs were implemented, 51.5% of the KCMSD's total elementary enrollment attended nine

schools with at least 90% minority enrollment. This year all nine schools have less than 90% minority enrollment, and only 28.5% of district elementary enrollment is in severely segregated schools. In schools with magnet programs, the number of severely segregated students (4,012 in 1985) has been reduced to zero. *See, e.g.*, App. 129. The percentage of minority students in severely isolated middle schools has fallen from 45.2% to 22.0% and in high school from 42.1% to 20.3%. Segregation is expected to decline further this coming Fall, when the last magnet programs reach full implementation.

Most of this progress has been achieved voluntarily, by attracting white students to magnet schools with outstanding and distinctive programs located in schools in the central city. For instance, Martin Luther King, Jr. Latin Grammar Middle School – where children wear uniforms, follow a strict discipline code, study Latin and sign contracts with parents and the school to do extra homework – has gone from all-black in 1985-86 to 30.3% nonminority this year. Knotts Environmental Science Elementary School has gone from having virtually no nonminority students to having nearly 30% today. Banneker, a computers-intensive elementary school replaced an all-black school with a new and larger facility and in five years has attracted a 35% nonminority enrollment.

For the most part, Kansas City's magnet schools follow an admissions policy that seeks to move enrollment voluntarily, by 2% each year, toward 35% nonminority. The progress achieved to date has come in part from the voluntary choices of students and their parents, and in part by attracting nearly 2,000 new white students, out of a district enrollment of 37,000, from private and suburban schools. Additional new students have been attracted each year, and the district court found in 1993 that even

more progress toward integration remained practicable. App. 129. The State did not appeal that finding.

In its order approving magnet schools, the district court noted that the educational improvements plan has two purposes – seeing that black "victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while simultaneously establishing an environment designed to maintain and attract non-minority enrollment." *Jenkins*, 639 F. Supp. at 54. The court of appeals agreed, noting that the

> foundation of the [remedial] plans adopted was the idea that improving the KCMSD as a system would at the same time compensate blacks for the education they had been denied and attract whites from within and without the KCMSD to formerly black schools.

Jenkins, 855 F.2d at 1301. After holding hearings last year, the district court concluded that, in practice as well as in the design, the educational improvements programs have served as an "integral part of the overall desegregation remedy." App. at 112. The Eighth Circuit affirmed, citing the interdependence of the challenged components of the remedy and of the remedy's other, unchallenged, components as an additional reason why Missouri had not met its burden of showing the appropriateness of ending the educational improvements programs. App. 19.

For the first time this coming Fall, all components of the ordered remedy, save the State's voluntary interdistrict component, will be in operation at all grade levels. Recognizing that implementation was in process, the district court recently has raised the prospect of unitary status and asked the parties to begin planning for it. Last year, for example, the district court ordered the submission of plans that assumed a phase out of State funding for the desegregation plan beginning in three

years. App. 140-41. Those plans will be reviewed by the district court at an upcoming hearing.

REASONS FOR DENYING THE WRIT

Neither of the questions that the petition presents asks the Court to review the findings of the two courts below that the educational improvements components of the remedy have failed to achieve unitary status. Nor could petitioners present that "partial unitary status" question, given that even the dissenters from the denial of *en banc* consideration below concluded that the record did not establish partial unitary status. App. 58. Nor would such a question warrant certiorari in any event, even assuming it were presented and that the record supported the petitioners' side of it, because the question turns on the application of the well-established rule of *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), to a factually unique set of violations and effects and a *sui generis* remedy ordered to cure those effects. Nonetheless, in the guise of asking for the Court's review on a question concerning standardized test scores – a question the case does not present because it posits a unitariness standard that neither court below endorsed or applied – petitioners in effect ask the Court to address a question they do not present, on the basis of evidence they did not offer below, in an effort to convince the Court to adopt a unitariness standard that it rejected only two years ago in *Freeman*. Below, respondent schoolchildren demonstrate why the questions actually presented do not warrant certiorari, why the petitioners did not and could not present any question of unitariness under the *Freeman* standard, and why the implicit burden of the petition is that school desegregation should end when it begins.

I. NEITHER COURT BELOW ADOPTED A STANDARDIZED TEST SCORE MEASURE OF REMEDIAL EFFECTIVENESS.

Complaining about the expense of remedies it did not appeal that were necessitated by violations it has admitted, and faced with implementing orders that faithfully adhere to this Court's doctrinal mandates, Missouri poses as its first question an issue that the case does not present. Thus, contrary to the State's assertion, Pet. 2, the courts below did not adopt a requirement that mandated the use of standardized test scores to measure remedial effectiveness in determining unitary status. *See* Brief of Respondents KCMSD and American Federation of Teachers Local 691 at I.A. Noting the district court's finding that Missouri's violation caused a "system-wide *reduction* in student achievement", 639 F. Supp. at 24 (emphasis in original), the court of appeals simply restated the long-recognized principles that remedies must eliminate effects of segregation to the extent practicable, *Bd. of Education v. Dowell*, 111 S. Ct. 630, 638 (1991), and that the measure of a remedy is its effectiveness, not its purpose, *Dayton Board of Education v. Brinkman*, 443 U.S. 528, 538 (1979). App. 21. Faced with the particular violation and its particular effects, the court of appeals then simply concluded that it will take time to remedy the system-wide reduction in student achievement in the KCMSD schools. *Id.* These statements raise no issues worthy of the Court's review.

Nor is there any support in the extensive remedial history of this case for the straw figure the State erects. Rather, from its first remedy order in 1985, the district court has adhered closely to the limitations this Court has imposed on school desegregation remedies. The district court made findings of fact that linked violations to effects and linked effects to each component of the remedy it ordered. Specifically, the court found intentional

segregation of blacks in the KCMSD and intentional degradation of the district's education program. The district court then found that these violations caused an "intense[]" concentration of blacks within the KCMSD, "inferior" education, and a system-wide *reduction* in student achievement", 639 F. Supp. at 24, which in turn caused "large numbers" of whites to flee from the KCMSD to suburban districts. Order of August 25, 1986.

The court then found *universal agreement* on educational improvement programs to remedy the violations and eliminate their effects. "No party to this case has suggested that this [remedial] plan should not contain components designed to improve educational achievement." 639 F. Supp. at 24. The State of Missouri thus "endorse[d]" many of the educational programs it now challenges, including "reduced class size, summer school, full day kindergarten, before and after school tutoring and early childhood development programs". *Id.* at 26. As originally proposed by the State, and as adopted by the district court, moreover, these programs were intended not as a one-time-only opportunity for a few students but to "increase student achievement", and thereby remedy the "system-wide *reduction* in student achievement" caused by segregation. *Id.* at 24. None of these fact findings, most of which were invited by Missouri, has ever been challenged by the State.

In reviewing the remedy orders, the court of appeals relied on these same well-established legal principles, 855 F.2d at 1299, approved the district court's fact findings, and affirmed the remedy.

Because the parties are in agreement on applicable legal standards, because those standards premise an appropriate remedy on the district court's findings of violations, effects and necessary measures to cure those effects, and because the district court made, and the court

of appeals affirmed, and in most cases the State never appealed the requisite findings, the remedial orders present no question meriting relief.

II. PARTIAL UNITARY STATUS UNDER THE RULE OF *FREEMAN* IS UNWORTHY OF CERTIORARI BECAUSE THE PETITIONERS DO NOT PRESENT THE QUESTION AND BECAUSE IT IS A FACT-BOUND MATTER THAT WAS UNANIMOUSLY RESOLVED AGAINST PETITIONERS BY BOTH COURTS BELOW.

The petition presents no question concerning partial unitary status. Even if it did, the case raises no new or important constitutional issues in that vein. The three-part "partial unitariness" standard in *Freeman* turns on various factual questions, all of which were answered without disagreement by the courts below. And the State neither challenges the relevant findings as clearly erroneous nor argues that the district court abused its discretion.

First, additional educational improvements are practicable. *See Freeman* at 1446. The district court has explicitly found that while there has been a "trend of improvement", the school district is "not anywhere close to its maximum potential." App. 131. The court of appeals agreed that "[t]he evidence on the record fell far short of establishing that such [educational and racial isolation] vestiges had been eliminated to the extent practicable." App. 19. On this ground alone, *Freeman* forbids a unitariness finding here.

Second, the educational components of the remedy – the only ones challenged here by the State – cannot be withdrawn without undermining the plan's remaining components. *See Freeman* at 1446. Despite having the burden of proof, the State made no attempt to demonstrate in either of the courts below that discontinuance of funding

for the educational programs would not adversely affect the "other facets" of the remedy, most particularly the magnet school programs designed to reduce racial isolation in KCMSD schools. The district court has repeatedly found an inextricable connection between the educational programs and the magnet schools, 639 F. Supp. at 54, most recently concluding that the educational programs remain an "integral part" of the plan's desegregation component. App. 112. The court of appeals agreed. App. 18. By not presenting any evidence below supporting a contrary finding, the State cannot overcome this second sufficient justification under *Freeman* for continuing the educational programs.

Finally, *Freeman* requires that the State establish that it has in good faith complied with the orders of the district court. *See Freeman*, 112 S.Ct. at 1446. As the court of appeals noted, and the State does not challenge, "[t]he State did not try to prove that it has demonstrated a good faith commitment to the whole of the court's decree." App. 19. Also on this basis alone, the State is not entitled to a declaration of partial unitary status.

In fact, the State's attention to its remedial responsibilities evidences less than good faith. The district court's findings of unconstitutional school segregation placed the State of Missouri immediately under an "affirmative duty to take whatever steps might be necessary" to cure the segregative, educational, and other effects of that violation. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 459 (1979) (quoting *Green v. County School Bd.*, 391 U.S. 430, 437-438 (1968)). Yet, the State repeatedly has refused to take such steps voluntarily or even to propose them when ordered to do so.

For example, in 1985, when the district court invited plans for magnet schools, 639 F. Supp. at 34, Missouri chose to submit no plan whatsoever, leaving the district

court with no alternative but to work from KCMSD's and the plaintiffs' joint plan. Also in 1985, the court asked the State to use its good offices to establish a transfer plan for minorities to attend school in volunteering suburban school districts. 639 F. Supp. at 38. Again, the State did not act, even though such a plan would have greatly reduced the cost of the voluntary KCMSD plan about which it complains. Seven years later the court of appeals noted that it had "stressed repeatedly" but without results the need for such a voluntary transfer plan, App. 20 n. 10, the main responsibility for which remained with the State.

Similarly, when the district court in 1987 sought suggestions for helping the KCMSD fund its share of the desegregation costs, the State offered no plan and expressed no opposition to the schoolchildren's motion for a court-ordered tax increase, even while insisting that means be found to enable the school district to pay its share. Yet, when the district court adopted the only proposal before it, in which the State previously had acquiesced, the State objected and brought the matter to this Court – still without alternative suggestions. The State thus has not attempted to prove its good faith commitment to the whole of the district court's decree, App. 19, because the facts permit no such demonstration.

The State seems to argue that, even if all three *Freeman* standards forbid a unitariness conclusion, the Court still should find the plan unitary because it is expensive. Although this issue is not before the Court, it deserves an answer. In the careful exercise of its discretion, the district court rejected the schoolchildren's request for a mandatory interdistrict plan as excessively intrusive on the interests of innocent individuals and suburban school districts. It then rejected the State's proposal for forced

intradistrict busing within a 75% minority district reeling from segregation-induced white flight, noting that the inevitable effect of the State's plan would have been *more* segregation. 639 F. Supp. at 35-38. Instead the district court ordered a less intrusive remedy: academic programs to remedy the segregation-caused inferior education available to students in the mostly minority KCMSD as approved by this Court in *Milliken v. Bradley II*, 433 U.S. 267 (1977); voluntary transfers of nonminorities to magnet schools; and refurbished buildings to reverse some of the physical, educational, and segregative effects of the State's violations.

The district court had no choice but to reject the State's *intra*district busing plan on remedial ineffectiveness grounds. It is true that among the remaining two plans (the one adopted and plaintiffs' mandatory *inter*district plan), the court chose the more expensive.[9] It is also true, as plaintiffs have repeatedly made clear to the district court, that this remedy is less satisfactory to them – because it is less immediately effective – than a mandatory interdistrict consolidation or transfer plan. But the plan the court chose has another virtue, which is legally

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[9] The plan is not as expensive as the petition claims. Pet. at 6. The figure the State gives is without citation to the record but surely includes capital expenditures expensed in a single year though the benefits will be reaped for decades. No school district in the nation accounts for its capital expenditures as the State would for KCMSD's. The more appropriate measure is the annual per capita cost of education in KCMSD, including all operating and desegregation expenses, which is about $7,900. KCMSD Operating and Desegregative Budgets, 1993-94. This figure is significantly lower than in the mostly white, suburban school districts in Missouri. The expenditures in Kansas City are remarkable in only one respect: they take place in a central-city, mostly African-American school district.

decisive under this Court's remedial-effectiveness decision in *Green*, 391 U.S. at 437-438, and its remedial-limits decision in *Milliken*, 433 U.S. at 280, as interpreted by the district court: Among all available plans, the one the court imposed is the only one that holds out even a hope of removing the vestiges of the State's violations and, at the same time, does not mandatorily involve school districts and schoolchildren not responsible for those violations. The district court can hardly be said to have abused its discretion in selecting the only educationally and desegregatively effective option that was available.

Besides, the remedy is working for many students. Nearly two thousand children from suburban and private schools chose last year to leave their former schools and enroll voluntarily in the 37,000 student, mostly minority, school district. Many formerly all-black schools have moved steadily and voluntarily toward significant racial integration. Thousands of students are learning foreign languages through full immersion instruction. Thousands are computer literate. Many are winning regional and national recognition for their academic accomplishments. Test scores are up significantly in the elementary schools where the children have had the full benefit of the educational programs in place just since 1988. Progress in science has been strong in nearly all grades. At all levels the KCMSD has demonstrated some degree of progress.

Much, however, remains to be accomplished. As the lower courts both found, additional progress toward the constitutionally mandated goal of eliminating the vestiges of petitioners' violation remains "practicable" and well within the reach of the plan, App. 21, 131.

III. THE STATE CONTENDS THAT IT SHOULD BE RELEASED FROM ITS REMEDIAL OBLIGATIONS UNDER *FREEMAN* BASED ON A PRINCIPLE THAT *FREEMAN* REJECTED.

Because the State did not file a motion in the district court seeking a declaration under *Freeman* (1) that the educational programs had been implemented for a reasonable period of time, (2) that they may be severed from the other components of the remedy, and (3) that their implementation satisfies Missouri's obligations to assist the school district in achieving unitary status, the "partial unitariness" issue is not properly before this Court. *See Freeman*, at 1445-1446. If the question *were* before the Court, it would present only matters of fact, given the district court's findings, affirmed on appeal and not challenged here as erroneous, that the educational programs are essential to curing the educational effects of the violation and to the success of the overall desegregation plan, 639 F. Supp. at 54, *aff'd* 855 F.2d at 1301; that those programs may not be severed from the rest of the plan but are an "integral part" of it, App. at 112; that those programs are having some initial success in improving education and desegregation, App. at 131, 112; and that additional remedial gains are practicable, App. at 131.

Where the district court has specifically found that the State's own "endorsed" educational parts of the remedy have not yet eliminated the vestiges of past discrimination to the extent practicable, and where it has found that those parts are integrally intertwined with other aspects of the overall remedial plan, the court's refusal to exercise its discretion to declare the educational programs unitary is unexceptionably proper. The affirmance by the court of appeals of the district court's exercise of its discretion is likewise unexceptional and presents no interesting question for this Court's plenary review.

Boiled down to its essence, therefore, Missouri's claim is that the Court should abandon the *Freeman* standard and adopt a standard that *Freeman* explicitly rejects. Missouri thus contends that, once having fully put in place educational programs designed to eliminate the reduced academic achievement that the violations caused, those very programs may immediately be abandoned regardless of whether they have yet been effective. In Missouri's view, full implementation, for even an instant, not effectiveness, is the measure of a defendant's remedial responsibility. Because this Court so recently rejected the State's notion that upon mere implementation of remedial orders the wrongdoer is entitled to a declaration of partial unitary status as to the subject matter of the orders implemented, and because the Court so recently concluded that, as a threshold, orders must be implemented "for a reasonable period of time", *Freeman* at 1439, there is no basis to grant certiorari here.

IV. THE SALARY ISSUE RAISED BY THE STATE DOES NOT WARRANT REVIEW BECAUSE IT DEPENDS UPON FACTS FOUND BY TWO COURTS BELOW, IS INEXTRICABLY RELATED TO UNCHALLENGED COMPONENTS OF THE REMEDY, AND IS THE KIND OF REMEDIAL DETAIL THAT IS BEST LEFT TO THE DISCRETION OF THE DISTRICT COURT.

In rejecting requests to adopt a less expensive but more intrusive mandatory interdistrict remedy, and in ordering a primarily voluntary but more costly remedy, the district court necessarily had to address complex implementation issues. One of those issues was the need to remedy the under-funding of schools caused by the violations and KCMSD's consequent inability to pay teachers even marginally competitive salaries. After the State rebuffed the district court's initial request that it

give the KCMSD more "versatility" in funding its educational and desegregative needs, Order of November 12, 1986 at 7, the district court unavoidably had to face the issue of providing salaries sufficient to prevent the otherwise certain loss of KCMSD's most skilled and experienced teachers and staff. 672 F. Supp. at 403, 410. Based on these findings, and recognizing the critical necessity in a voluntary plan of retaining staff capable of implementing the educational improvement and magnet schools components of the remedy, the district court ordered that salaries be supplemented. *Id.* The State did not appeal this order.

Now, however, the State challenges a subsequent salary order needed to implement the prior order. In doing so, it runs squarely into fact findings made by both courts below that the subsequent order was essential to the success of the remedial plan. App. 87.

In a voluntary remedial scheme, in which teachers and staff alike are expected to implement new programs, learn new teaching styles, do their jobs in the midst of construction and renovation activities, keep buildings clean and attractive for prospective parents in KCMSD's "Schools of Choice" system of magnet schools, and maintain the security of buildings, people, and property, it was not clearly erroneous for the district court to conclude that nearly (but still not entirely) competitive salaries were essential to the implementation of the remedies. Nor was it clearly erroneous for the courts below to conclude that all employees, either because of their roles in the desegregation remedy or to avoid a two-tiered, morale destroying, salary system that would impede effective implementation of the remedy, necessarily required salary increases to assure the effectiveness of this desegregation plan. The State thus asks the Court to engage in

second guessing of the lower courts as to factual determinations made in the process of fine-tuning an aspect of the plan that is critical to all other aspects and to which the State has never objected in principle. Because no important issues emerge from the findings and exercise of discretion below, there is no reason for this Court to review them.

CONCLUSION

For the foregoing reasons, the writ should be denied.

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No. 93-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

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Respondents.

On Petition for Writ of Certiorari to the
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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

REPLY TO RESPONDENTS' STATEMENT OF REASONS FOR DENYING THE WRIT

Across the nation, dozens of desegregation cases are moving into the final stages of their remedy phases. The issue presented in all these cases, as here, is the appropriate legal standard for determining when the defendants' obligations end. This Court addressed this issue in *Freeman v. Pitts*, 112 S.Ct. 1430 (1992) and *Board of Educ. v. Dowell*, 498 U.S. 237 (1991). This pure legal question is the issue about which the parties to the Kansas City desegregation case — now in its seventeenth year after the expenditure of over $1.3 billion — are in

sharp disagreement.[1] The respondents claim, and the lower courts agreed, that a federal court may require, as a prerequisite for unitary status, that defendants show not only that they have provided equal educational resources, but also that students in the district are attaining higher levels of educational achievement. App. A-21.

That standard is inconsistent with *Dowell*, *Freeman*, and their predecessors, and should be flatly rejected by this Court. Absent this Court's repudiation of that requirement, lower courts in other desegregation cases could be forced to expand greatly the contours of already-existing remedies.[2] This would effectively transform those temporary remedies into permanent fixtures.

I. The Student Achievement Standard Imposed By The Lower Courts Does Not Put The Plaintiffs In The Place They Would Have Been Absent Past *De Jure* Segregation; The Provision Of Equal Educational Resources Accomplishes That Goal. Rather, The Lower Courts' Outcome-Based Standard Imposes A New, Extra-Constitutional Requirement For Unitary Status.

Respondents, particularly the KCMSD, attempt to justify the Eighth Circuit's extra-constitutional student outcome requirement as simply

[1] Contrary to respondents' apparent belief, the State has no intention of relitigating decades-old liability issues. Respondents, particularly the plaintiffs below, understandably prefer to dwell on the past rather than the future course of this temporary remedy. To that end they devote nearly half of their Statement of the Case to an irrelevant history of *de jure* segregation in Missouri, which ended decades ago. Jenkins Br. at 4-12. Petitioners agree that segregation by law is a sad chapter of Missouri's past. The question now, however, is whether this Court should reverse the lower courts' imposition of a constitutionally erroneous, impracticable and unachievable remedy for the future.

[2] The result of the panel's ruling is demonstrated by a recent order of the District Court supervising the St. Louis desegregation remedy. In that case, which itself has run 22 years at a cost exceeding $1.65 billion, the District Court adopted the Eighth Circuit's erroneous standard, finding that before unitary status could be declared, defendants must show "improvement in academic achievement by black students." Moreover, the court ordered the defendant school district to submit "specific, measurable outcome-based goals addressing: (a) increasing scores on standardized tests. . . ." *Liddell v. Board of Education*, No. 72-100C(6), slip op. at 2-3 (E.D. Mo. May 2, 1994).

a matter of "put[ting] the victims of unconstitutional conduct as nearly as reasonably possible in the position they would have been but for the constitutional violation." Resp. Dist. Br. at 19. But while respondents have correctly summarized the purpose of a desegregation remedy, the lower courts' student outcome standard defies it. This is precisely why review is required here.

Respondents contend that putting a KCMSD student in the position he would have occupied absent past constitutional violations requires the State to provide extraordinary desegregation funding until "every school [in] . . . the District has reached the national norm" in student achievement tests. App. A-62 (Testimony of KCMSD superintendent). Quite apart from the unresolvable issue of how one can know the student would have achieved this level absent unconstitutional conduct that likely ended before he was even born, the standard is simply wrong as a matter of Fourteenth Amendment law. Putting that student in the place he would have occupied absent unconstitutional discrimination means providing equal educational facilities and programs — which respondents concede the State has done.[3] It does not require guaranteeing the student a result in the 50th percentile on a standardized achievement test. The lower courts were simply wrong in permitting consideration of that criterion, much less in requiring its attainment.

Moreover, the outcome-based standard that respondents attempt to justify as a "reaffirmation of well-settled" constitutional law (Resp. Dist. Br. at 18) is in fact just the opposite — it flatly contradicts this Court's unitary status standards in at least two respects. First, the panel's student achievement standard contravenes the principle, emphasized in both *Freeman* and *Dowell*, that desegregation remedies are *temporary* deviations from the norm of parental and neighborhood control over schools. *Freeman*, 112 S.Ct. at 1448; *Dowell*, 498 U.S. at

[3] Respondents attempt to minimize the District Court's finding that the remedies have already "provide[d] the KCMSD with facilities and opportunities not available anywhere else in the country." App. A-115. However, they could not contravene the State's evidence at trial that the *Milliken II* facilities and programs have been fully and properly implemented in KCMSD since at least 1988 and that the KCMSD " 'exceeds what's available in all the suburban school districts in almost every area of classification' " examined by the Department of Elementary and Secondary Education. *See* discussion at App. A-61 (Beam, J., dissenting from denial of reh'g en banc).

248. Respondents themselves concede that an outcome-based standard likely will prolong this case for decades, if not longer. At trial the District called for an indefinite remedy based on the speculative assertion that student achievement might someday reach an arbitrarily selected level. The District's former Assistant Superintendent for Instruction, Art Rainwater, testified that even if it took 100 years for KCMSD to attain respondents' arbitrarily selected achievement levels, the remedy must continue "regardless of how many years" it takes. (Full colloquy at App. A-62). Similarly, the Superintendent, Dr. Walter Marks, testified that the remedy would not be complete until "every school [in] . . . the District [has reached] the national norm, the 50th percentile" in student achievement tests. *Id.* This is hardly the "temporary" type of remedy envisioned by this Court in *Freeman* and *Dowell.*

Moreover, the legal standard injected by the panel defies *Freeman* and *Dowell* in another crucial respect. *Freeman* limited a desegregation defendant's obligations to those matters over which it is able to exercise control. 112 S.Ct. at 1445. Referring to conditions caused by demographic shifts outside the control of the defendants, this Court stated, in language strikingly applicable here:

> It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. *To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once de jure segregated.*

112 S.Ct. at 1448 (emphasis added).

Given this Court's recognition that "a myriad of factors . . . might affect a particular student's ability to assimilate information in the classroom," *Board of Education v. Rowley*, 458 U.S. 176, 198 (1982), the Eighth Circuit's rule requiring the State and District to improve student test scores to national norms (or some other arbitrary level) imposes a requirement that simply may not be attainable. Desegregation defendants are to be held responsible only for matters within their control and only to the extent they can effect practicable remediation. 112 S.Ct. at 1445.

II. Respondents Expressly Urged The Court Of Appeals To Reject The State's Request For Partial Unitary Status On The Basis That Student Achievement Had Not Risen Sufficiently; The Court Of Appeals Panel Expressly Adopted The Argument, Ruling That Parties Seeking Unitary Status Must Prove That Student Achievement Has Been Improved.

Rather than confront the panel's irreconcilable deviation from *Freeman* and *Dowell*, respondents seek to disguise the lower courts' erroneous rulings, claiming that they did not really engraft a student achievement test onto the legal standard set out in the Court's two decisions. They so argue despite the fact that in their effort to defend the District Court's ruling they specifically argued to the Eighth Circuit that unitary status was inappropriate because of lagging "educational outcomes." Dist. App. Br. at 26.[4] Moreover, eight of the eleven judges of the Eighth Circuit expressly agreed that the panel decision adopted a student achievement standard for unitary status.

First, the five Eighth Circuit judges dissenting from the denial of rehearing en banc unmistakably understood that the panel and the lower court opinions were premised on a standard requiring enhanced student achievement. Led by Judge Beam, they wrote:

> The appellees . . . contend that the panel did not rely on a student achievement standard in affirming the district court. The words "achievement test results" or even "test results," so say the appellees, "are nowhere to be found in the panel decision." This argument, in my view, is disingenuous. The panel affirmed the district court. The district court obviously relied upon test scores below the national norm as the basis for its ruling. The district court, by its own statement, "[h]as gone to great lengths to provide the KCMSD with facilities and opportunities *not available* anywhere else in the country." * * * The only factor the district court saw standing in the way of unitary status for the educational program was continued below average academic performance. Indeed, there is no other evidence in the record to support a conclusion that the educational enhancement (*Milliken II*) program of the KCMSD is wanting.

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[4] References to the parties' briefs on appeal before the Eighth Circuit are designated as "___App. Br."

A-60-61 (Beam, J., dissenting) (citations omitted) (emphasis in original).

So too, the three judges concurring in the denial of rehearing en banc (including the author of the panel opinion and another panel member) conceded the panel's application of a test results standard in acknowledging that "[w]hen we deal with student achievement in a quality of education program in the context of relieving a school district of court supervision, *test results must be considered.*"[5] A-48 (Gibson, J., concurring) (emphasis added). Thus, eight of the 11 en banc judges of the court of appeals viewed the panel's decision as engrafting a student achievement hurdle onto the *Dowell* and *Freeman* standard.

This is hardly surprising for the respondents urged this very position both before the District Court and in the Eighth Circuit. On appeal, the District respondents made no less than 21 separate references to student achievement in their brief. Dist. App. Br. at 2, 5, 6, 23-26. The District argued, for example, that "test scores . . . remain below national norms in most instances." Dist. App. Br. at 25. The District relied heavily on the trial testimony of District witnesses that there were "more reading, math and language arts scores above national norms in 1991 than in 1985 but most [were] still below [national norms]." Dist. App. Br. at 6, n.5. The District also faulted the State for not alleging that "*deficits in educational outcomes* due to segregation have been eliminated in the KCMSD." *Id.* at 26 (emphasis added). And, in opposing the State's petition for rehearing, respondents-plaintiffs argued that, "[f]or the State to receive a declaration of partial unitary status on the educational components . . . it must show that achievement overall has increased." Pltfs. Resp. to Pet. for Reh'g at 6. In unmistakable terms, therefore, respondents sought to defend the District Court's decision on the basis that "educational outcomes" had not risen enough to warrant a declaration of unitary status — the same holding they now claim the panel failed to reach.

[5] Having acknowledged the application of a test score standard, the concurring judges inexplicably and erroneously concluded, "Nothing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the *only* criteria used in denying the State's claim that its obligation for the quality education programs should be ended." A-48 (emphasis added). Even this statement, however, acknowledges test results were a basis for the district court's denial of the State's unitary status request. Because the Fourteenth Amendment requires only the provision of equal opportunities, *any* reliance on test scores is improper.

In the same vein, the District Court, as the en banc dissenters observed, made pointed reference to student achievement in its decision of April 16, 1993, from which the panel attempted to assemble a suitable set of findings to support its ruling. A-59-60. For example, in its April 16 order, the District Court stated that the KCMSD magnet programs could not be accorded partial unitary status because

> [while] the evidence is clear that there has been a trend of improvement in academic achievement in the KCMSD . . . the Court is not satisfied that the District has reached anywhere close to its maximum potential because the District is still at or below national norms at many grade levels.

A-131.

Thus, in purporting to apply the *Dowell* and *Freeman* standards to the KCMSD magnet program, the District Court held that simply because test scores were below national norms, more could be done, and therefore, partial unitary status could not be declared.[6]

Similarly, the District Court's statements of its goals for the *Milliken II* components — made at the May 1992 hearing that led to the trial court's implicit rejection of the State's unitary status request — also evidence the District Court's erroneous reliance on a student achievement standard. The trial court stated that " 'all these [*Milliken II*] matters were elements to be used to try to integrate the [KCMSD] .... That's the goal. *And a high standard of quality education.*' " App. A-11 (quoting District Court). Thus, although the District Court failed in its June 17, 1992 order to make the necessary findings when it denied the State's partial unitary status request as to the *Milliken II* programs, its later orders make clear that it misapprehended the *Freeman* stan-

[6] The District Court credited but chose not to rely upon expert evidence presented by the State that other factors, outside the educational experience, made the attainment of national norms in KCMSD most unlikely. A-132. Thus, the trial judge, in ordering defendants to produce increased achievement in the KCMSD magnet program, as he did in the *Milliken II* components at issue here, committed the taxpayers of Missouri and Kansas City to a potentially perpetual remedy, in clear defiance of *Dowell's* and *Freeman's* mandate that desegregation remedies are to be temporary measures, terminated when they have achieved that which is practicable. 498 U.S. at 247-48; 112 S.Ct. at 1446.

dard to require improved student achievement, which it plainly does not.[7]

Thus, as before the Eighth Circuit, respondents remain "disingenuous" in insisting that the lower courts did not premise their denial of the State's request for partial unitary status on a student achievement standard. A-60 (Beam, J., dissenting from denial of reh'g en banc). Eight of the eleven Eighth Circuit judges so read the panel's opinion, and respondents expressly urged the panel to rule on that basis. The District Court's later orders, used by the panel as a substitute for specific findings in the order at issue here, also evidence the trial court's use of a student achievement standard as to both the *Milliken II* components and other portions of the remedy. The lower courts plainly injected an impractical and erroneous student achievement obstacle into the accepted unitary status standard. This Court should review that flawed interpretation of the Fourteenth Amendment.

III. The Student Achievement Issue Presented For Review Is Not "Fact-Bound" Because Neither Of The Courts Below Made The Kind Of "Careful Factfinding" Necessary For Resolving *Freeman* Issues—Rather, For The First Time On Appeal, The Court of Appeals Erroneously Engrafted An Improper Student Achievement Hurdle Onto The Legal Standard For Unitary Status.

Respondents are also incorrect in arguing that the Eighth Circuit's erroneous student achievement standard is not worthy of Supreme Court review because it is the product of a complex record and unappealed and detailed factual findings. Their contention ignores the District Court's failure to make any findings whatsoever in first rejecting the State's request for partial unitary status. Moreover, it fundamentally misconstrues the State's argument. The State does not seek review of any factual finding, nor does it ask this Court to declare partial unitary status. Petitioners seek only the correction of the erroneous legal standard applied below. Moreover, respondents' corollary argument, in which they incongruously contend that the State

[7] As noted earlier, *supra* note 2, the District Court overseeing the St. Louis desegregation case also interprets the panel decision as imposing a student achievement requirement.

never requested partial unitary status below, fails to explain what could have triggered the supposed findings upon which they so heavily rely.[8]

Respondents are flatly wrong in portraying the legal issue here as one cloaked in complex and detailed findings. As the panel acknowledged, the District Court made no express findings at all, either detailed or not. A-10. The District conceded this below, admitting that what the District Court's orders "do not do — and need not do — is detail the numerous obvious reasons for the district court to reject the State's . . . *Freeman* argument." Dist. App. Br. at 31-32. Instead, in its June 17, 1992, order denying the State's request for partial unitary status as to the *Milliken II* components, the District Court simply approved a $54 million budget for those programs. In a July 30, 1993, order, the District Court went barely further, concluding only that "the Court finds that the State's arguments that the [*Milliken II*] components have attained unitary status are unpersuasive." A-112. This hardly constitutes a factual finding, much less the "careful factfinding and detailed articulation of findings" that the panel itself properly read *Dowell v. Board of Education* and *Freeman* to require. A-20. Thus, respondents are incorrect when they portray the legal issues here as factual questions undeserving of this Court's attention.

IV. This Matter Requires This Court's Review Because The Lower Courts Improperly Interpreted The Fourteenth Amendment To Permit Imposition of Desegregation-Funded Salary Increases For All Non-Instructional KCMSD Personnel Where There Were No Findings That The Levels Of Those Salaries Violated Anyone's Equal Protection Rights Or Were The Product Of *De Jure* Discrimination On The Part Of The State Or Local School Board.

Respondents return to a familiar refrain in insisting that the lower courts' orders imposing desegregation-funded salary increases for all non-instructional personnel within the KCMSD involve yet another

[8] This is a novel assertion. Respondent District told the Eighth Circuit that, "[a]nticipating the State's case concerning *Freeman v. Pitts*, [it] also presented extensive evidence of the *Milliken II* programs." District App. Br. at 5. Apparently at the trial and appellate stages respondent District plainly understood the State to have requested partial unitary status under *Freeman*.

factually-bound issue. They urge this despite the fact that no court has ever found that (1) salaries for non-instructional personnel were depressed as a result of the State's or the District's past constitutional violations or, (2) if it existed, this condition violated plaintiffs' constitutional rights.

Petitioners ask this Court to review only the legal question whether the salary increases for non-instructional personnel constitute an inappropriate upgrade of school district resources, unrelated to desegregation, which do not "advance the ultimate objective of alleviating the initial constitutional violation." *Freeman*, 112 S.Ct. at 1445.

CONCLUSION

This Court should grant the writ of certiorari and review the important legal issues presented in the petition.

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AFT Exhibit 33 (June 9, 1992) A-484

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Appendix AA
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DMC Exhibit 1 (July 22, 1994) A-589

Appendix LL
Motion of Plaintiffs for an Order Approving Payment by the State Defendants of Funds to Study and Plan Three VIT High Schools (September 29, 1994) A-713

Note: The following items are contained in the Appendix to the Petition for Certiorari

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Opinion of the Court of Appeals for the Eighth Circuit (December 8, 1993) A28-35

Denial of Petition for Rehearing by the Court of Appeals panel (February 24, 1994) A36-42

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Orders of the District Court for the Western District of Missouri:

Order, June 17, 1992 (W.D. Mo.) A69-75

Order, June 25, 1992 (W.D. Mo.) A76-93

Order, June 30, 1993 (W.D. Mo.) A94-109

Order, July 30, 1993 (W.D. Mo.) A110-121

Order, April 16, 1993 (W.D. Mo.) A122-143

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
6/5/84	1004	GENERAL MEMORANDUM AND ORDER. ORDERED that the Rule 41(b) motions filed by the following school districts & their superintendents are granted: Blue Springs Reorganized School District R-IV, Center School District No. 58, Fort Osage Reorganized School District R-1, Grandview Consolidated School District No. 4, Hickman Mills School District, Independence School District, Lee's Summit Reorganized School District R-VII, Liberty School District, North Kansas City School District, Park Hill Reorganized School District No. 5, and Raytown Consolidated School District No. 2.
9/17/84	1023	ORDER - filed, mailed. (ORDERED that the Clerk is directed to enter judgment on the issue of liability in favor of HUD and against plaintiffs; in favor of plaintiffs and against the State defendants and the KCMSD; and in favor of the KCMSD and against the State defendants on its cross-claim; and it is further ORDERED that within 90 days from the date of this order, the State Board of Education and the KCMSD Board of Education are directed to submit a proposed plan which will have the effect of removing the vestiges of the dual school system as it presently exists in the KCMSD: and it is further ORDERED that the plaintiffs shall have 30 days dafter the proposed plan is filed in which to file objections to it.)

9/17/84 1025 CLERK'S judgment on decision by the court - (re #1023) mailed.

1/18/85 1046 PLAN - KCMSD Plan for Remedying Vestiges of the Segregated Public School System.

1/25/85 1048 ORDER - filed, mailed. (ORDERED that promptly on receipt of this order, the Kansas City Missouri School District Board of Education is directed to begin the preparation of an amended proposed plan to be implemented within the existing boundaries of the Kansas City Missouri School District, which would have the effect of removing the vestiges of the dual school system as it presently exists in the KCMSD. Within 15 days from the date of this order, the KCMSD Board is to notify the Court in writing the amount of time which it believes is reasonably necessary to submit an amended plan.)

6/14/85 1110 MEMORANDUM - opinion (re-remedy) Copies distributed.

6/16/86 1192 ORDER - setting up a plan concerning pending motions on amending budget for full-day kindergarten program, salary schedule for personnel hired for desegregation programs, adjustment of 1986/87 magnet programs, voluntary interdistrict transfer program, and funding for desegregation plan. All parties are to implement this plan in a thorough & efficient manner. Failure to make a diligent effort may result in sanctions against a party or individual. Mailed.

8/25/86 1213 ORDER - granting the motion of the KCMSD to enjoin the rollback in the real estate tax levy

otherwise required under Proposition C. - that the tax levy rollback required by Sec. 164.013, R.S.Mo. (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional $6,500,000.00 to enable the KCMSD to meet its share of the desegregation plan for the current fiscal year. Mailed.

11/12/86 1237 ORDER - that the KCMSD's motion for approval of its long-range magnet school plan is granted in part & denied in part as set forth in this memorandum. Mailed.

5/8/87 1326 MOTION of KCMSD for further funding relief w/memorandum.

7/6/87 1367 ORDER - filed, mailed. (ORDERED that the Court approves the 1987-88 desegregation budget as set for the in this opinion; and it is further ORDERED that the State and KCMSD are jointly and severally liable for the 1987-88 desegregation budget totaling $56,834,225.00 and the State of Missouri and the KCMSD are directed to contribute $42,625,668.00 and $14,208,557.00 respectively; and it is further ORDERED that the Court defers ruling on the motions of the KCMSD and AFT Local 691 regarding funding of estimated budget deficits until after the 8/3/87 on the long-range capital improvement plan; and it is further ORDERED that the Court has modified its 6/16/86 and 11/12/86 orders as set forth in this opinion). (RGC)

8/19/87 1413 ORDER - filed, mailed; that KCMSD's motion to modify the Court's 07/06/87 order is granted in part and denied in part as set forth in this order. (RGC)

9/15/87 1436 ORDER - filed, mailed. (ORDERED that the motion of the KCMSD for the approval of its capital improvement plan is approved as modified herein; and it is further ORDERED that the motion of the KCMSD for approval of its student transportation plan for the long-range magnet school plan is deferred and if a hearing is necessary on the plan, it is set to commence on 12/14/87 at 9:00 a.m.; and it is further ORDERED that the motion of AFT 691 for alternate funded relief regarding the salaries of the KCMSD teachers is denied; and it is further ORDERED that the motion of KCMSD for funding relief is granted in part in that it is ordered that in order to fund the obligation of the KCMSD for the desegregation program, a surtax of 1.5% is added to the Missouri State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and the tax levy for the KCMSD is raised to $4.00 per $100 assessed valuation; and it is further ORDERED that said increased revenue shall be applied to satisfy the obligations of the KCMSD as set forth in this memorandum). (RGC)

7/25/88 1648 ORDER - filed, mailed. (ORDERED that the Court approves the 1988-89, 1989-90 & 1990-91 desegregation budgets as set forth in this order; and it is further ORDERED that the KCMSD is directed to submit to the Court modified budgets for year 1988-89 for the early childhood education program, the base budgets, and the 1986-87 magnets; and it is further ordered that the KCMSD is to submit amended

budgets for the year 1989, 1990, and 1991 summer school programs). (RGC)

7/5/89 1950 ORDER - filed, mailed. (ORDERED that the KCMSD's motion to amend its motion for approval of a desegregation plan for 1989-90 is granted; ORDERED that the KCMSD's motion for approval of a desegregation plan for 1989-90 is granted; ORDERED that plts' motion for program and budget modifications of prior remedial orders is granted; ORDERED that the KCMSD shall submit 1986-87 magnet budgets for 1988-89 and 1989-90 on or before 8/31/89, and for 1989-90 as soon as the amount is available; ORDERED that the KCMSD shall submit a proposed budget for 1989-90 for Suzuki teachers on or before 8/31/89; ORDERED that the parties shall file briefs on the issue of whether Elementary I, II and III were ordered as magnet schools under the LRMP or the LRCIP on or before 8/31/89; ORDERED that the KCMSD shall submit proposed budgets for King Middle School for 1989-90, 1990-91 and 1991-92 on or before 8/31/89; ORDERED that the DMC shall submit a proposed salary study budget as soon as the necessary information can be obtained and complied; ORDERED that DMC appointments for two year terms to begin on 7/1/89, are made as set forth in this order; ORDERED that the DMC's budget request and request for postponement of the opening of Southeast I are granted as set forth in this order; ORDERED that the KCMSD shall submit proposed budgets for Southeast Elementary I for 1989-90, 1990-91 and 1992-93 on or before 8/31/89

4/23/90 2262 ORDER - that the components, as presented in KCMSD's motion for approval of desegregation plan for 1990-91 & the joint stip, are approved with budgets as summarized in order; it is further ordered that the funding for the District task forces in the Long-Range Magnet School Plan & budget at $75,000 per year for the next 2 years (1990-91 & 1991-92) shall be allocated to support all 8 of the magnet theme task forces, for themes that are undergoing implementation as well as those themes already implemented. The district task forces shall provide written notices of their meetings, minutes of their meetings shall be provided to the DMC and the parties, & at the first meeting of each task force each year there shall be adopted procedures & objectives for the task forces; it is further ordered the Admissions Guidelines in the Long-Range magnet School Plan will be amended to provide that 1st-time enrollment in foreign language immersion programs in grades 2 & higher will be limited to students with a demonstrated proficiency to their grade level in the 2nd language; it is further ORDERED that the following components presented in KCMSD's motion for approval of desegregation plan for 1990-91 & pla's motion or Year VI program & budget modifications are approved w/the following modifications (see order for details); it is further ordered upon review of section 4 of the joint stip concerning components on which limited issues are reserved by the parties, that the Court will receive briefs on the schedule agreed to by the parties, limited to the issues set forth in the joint stip. (RGC)

5/14/90 2284 ORDER - A voluntary interdistrict transfer (VIT) proposal has been presented to the Court by plas & the School District of KCMO. Upon joint suggestion of all parties, State of MO dfts are ordered to 1) meet w/representatives of public school districts having less than 25% minorities enrolled & located w/i Clay, Platte, & Jackson Counties & w/parties to this case; 2) provide to them & explain the proposed VIT plan attached hereto; 3) obtain agreements of school districts to participate in VIT plan & the number of students each will accept in September, 1990, or their comments and/or suggestions for change; and 4) report on the State's discharge of these duties w/i 30 days of this order. Suggestions or arguments by any entity as to the contents of the VIT plan will not be used as evidence of racial animus on any future proceeding. This Court will hold a hearing on the status of this proposed VI plan on the ___ day of June, 1990 beginning at ___. (RGC)

6/26/90 2366 ORDER - that plas' motion for Year VI program & budget modification is granted as set forth in this order; that KCMSD's motion for approval of desegregation plan for 1990-191 is granted as set forth in this order; that DMC's budget request is granted as set forth in this order; that KCMSD shall file a proposed security component budget for 1990-91 & 1991-92 on or before 7/13/90; that KCMSD shall submit the amount of costs avoided elsewhere for 1990-91 as soon as they are available. (RGC)

7/23/90 2398 ORDER - 1) KCMSD authorized to increase salaries to employees by a total of up to $68 million. Over 2-year period, State shall pay $34

million & KCMSD shall pay remainder; 2) State shall pay $15 million as needed to fund salary increases for 90-91 & $19 million to fund 91-92; KCMSD is authorized to increase property tax levy rate for 90-91 by $.96 per $100 assessed valuation; 4) tax rate of $4.96 is a reasonable maximum tax levy rate; 5) KCMSD may seek to remove from escrow accounts any taxes paid under protest; 6) KCMSD will systematically collect & report to the DMC appropriate data regarding results of recruiting efforts; 7) no party waives its rights w/regard to positions taken in this litigation & each party specifically preserves its rights to make whatever arguments it deems appropriate w/regard to these issues after conclusion of 91-92 school year covered by order (see order for details). (RGC) Mailed.

7/5/91 2813 ORDER - this court approves the stipulated Year VII budget items; KCMSD's proposal for the Early Childhood Education Development Program is granted; KCMSD's proposal to add 5 teachers at Lincoln College Prep Academy granted; KCMSD's security proposal granted; KCMSD's Tuition Assistance for Paraprofessionals proposal denied; KCMSD's J.A. Rogers Academy of Liberal Arts & Science proposal to add 2 teachers & cont the home school coordinator granted; plt's req for reconsideration of the Banneker & Richardson computer equipment proposal granted as to software & repair & Maintenance; KCMSD's proposal for AAA Achievement granted w/exception that the State is not required to assist the KCMSD in exceeding AAA requirements for libraries; plt's req

for reconsideration of the Recruitment Aide denied; the 17 resource teachers who were cut from the operating budget as a result of administrative reorganization are added to the year VII desegregation budget. (RGC) Mailed.

2/10/92 2999 MOTION - for Desegregation Funding for Teachers' Salary Increases in Fiscal Years 1992-93 thru 1994-95 - AFT Local 691.

3/2/92 3011 MOTION & RESPONSE - for Deseg Funding for its 1992-93 Salary Proposal & Response to AFT Local 691's Mt for Deseg Funding for Teacher Salary Increases for 1992-93 thru 1994-95 - KCMSD.

3/2/92 3012 SUGGESTIONS - in support of KCMSD's Mt for Deseg Funding for 1992-93 Salary Proposal & Response to AFT Local 691's Mt for Deseg Funding for Teacher Salary increases for 1992-93 thru 1994-95 - KCMSD.

3/25/92 3031 CONSOLIDATED RESPONSE - to Mt. by AFT Local 691 for Deseg Funding for Teacher Salary Increases in Fiscal Yrs 1992-93 thru 1994-95 & to KCMSD's Mt. for Deseg Funding for its 1992-93 Salary Proposal & its Response to AFT Local 691's Mt - State.

5/12/92 3083 JOINT STIPULATION - concerning KCMSD's 1991-93 Deseg Plan - by all parties.

5/13/92 3084 REPLY - to State's response to KCMSD's Mt. for approval of deseg plan for 1992-93 - KCMSD.

6/4/92 3109 POST-TRIAL BRIEF - on Year VIII & Long-Range Magnet School Extension Proposals - by plts.

6/8/92 3113 BR - KCMSD's Post-Hearing Brief regarding KCMSD Deseg Plan for 1992-93.

6/5/92 3114 MEM - State's Post-Hearing Memorandum regarding year VIII issues

6/17/92 3126 ORDER - the Year VIII Deseg Budget is as follows: Deseg Budget $54,592,191 KCMSD Obligation is $33,185,681 totals (see order for details). KCMSD shall submit its Long-Range magnet Plan by 9/1/92. (RGC) Mailed.

6/25/92 3139 ORDER - That KCMSD's salary proposal for 1992-93 is approved; ORDERED that KCMSD is authorized to maintain its property tax levy at a rate of $4.96 per $100 assessed valuation for the 1992-93 tax year; and it is further ORDERED that funding for the 1992-93 salary package will be 50%/50% joint and several liability between State and the KCMSD.

9/1/92 3188 JOINT MOTION - of KCMSD & plas for approval of long-range magnet renewal plan.

2/5/93 3306 MOTION - of AFT Local 691 for desq funding of certified and classified employee salary increases in fiscal years 93-94 through 2002-03 and sugg in supp

3/26/93 3363 MOTION - KCMSD's Motion for Desegregation Funding Its Salary Proposal for 1993-94 through 1995-96 and resp to AFT Local 691's mt for desegregation funding for salary increases in fiscal years 1993-94 through 2002-03.

4/7/93 3367 MOTION - by AFT for desegregation funding for operating, warehouse, maint, mailroom and

food service employee wage increases in fiscal yrs 93-94 through 95-96 and sugg in supp

4/16/93 3375 ORDER - by Judge Clark that KCMSD and plas' mt for approval of the Long-Range Magnet Renewal Plan is den in part and gr in part consistent w/this order; and that the current LRMP is extended for a 2-yr period w/the same budgetary levels subject to reasonable modifications w/the supervision of the DMC and that the District is to implement a procedure to consistently measure and evaluate the effectiveness of the magnet programs and this is to be done w/n the current budgetary constraints of the magnet program; that the District is to implement a Montessori theme at the new elementary school to come on-line for the 1993-94 school year; and it is further ordered that the District req to modify the themes at Lincoln College Prep and Middle School is gr and that the State's request to operate three District Schools under an OBE program is den; that the District is to submit a financing proposal as outlined herein by 6/30/93; that the State may, but is not required to, submit a financing proposal by 9/1/93; that the capital improvements req by the District are gr only to the extent necessary to implement the theme additions and modifications approved by the Court herein.

4/26/93 3380 SUGGOPP - State's consolidated resp in opp to AFT's and KCMSD's salary mts and mt for order expressly establishing state right of contribution

5/7/93 3388 RPLY - AFT's reply to the State's consol resp in opp to the AFT's and the KCMSD's mts for desegregation funding for salary increases resp to the KCMSD's mt for desegregation funding of its salary proposal for 1993-94 through 1995-96 and suppl of its salary mt for certified and classified employees

5/10/93 3391 RPLY - KCMSD's rply to the States' consolidated response in opp to AFT's and KCMSD's salary mts and resp to the State's mt for order expressly establishing state right of contribution

6/30/93 3473 ORDER - from Judge Clark; that the foregone salary step increases are ordered restored for FY93-94 and that the Court approves funding for 2% annual wage increases in 93-94 through 95-96 for administrators and other non-represented employees as well as for classified personnel; that the Court approves a 2.5% annual wage increase for each of those persons represented by AFT's mt for operating, warehouse, maintenance, mailroom and food service dept for 93-94, 94-95 and 95-96 for a total of 7.5% and that the District request to develop a "group exit" program is gr and that the State's mt to strike pla's post-trial mem is den; that the State's mt for lvf a rply to plas's mem is gr; that the Court will defer ruling the State's mt for an order establishing an express right of contribution until after the 7/7/93 hearing on Milliken II issues.

12/22/93 3669 ORDER - by Russell Clark that the plas' mt for approval of the North Kansas City Voluntary

Interdistrict Transfer plan is denied; and it is ORDERED that the State's plan is approved by the Court as a basic starting point for the negotiation of a voluntary interdistrict transfer plan; that the parties are to meet with the North Kansas City School District officials and report back to the Court the results of their attempt to negotiate a VIT plan consistent with this Order w/n 30 days of the date of this Order.

9/16/94 3841 REPORT - KCMSD 1st Report to the Court on Status of magnet, Capital and Financial Planning

9/29/94 3844 MOTION - of plas for an order approving payment by the State Dfts of funds to study and plan three VIT High Schools

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

CRAIG JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants

ORDER

[Filed: Sept. 17, 1984]

Originally, plaintiffs and the KCMSD filed this action jointly alleging various federal and state agencies and surrounding school district officials caused or contributed to cause the racial segregation existing in the metropolitan schools. In 1978 when the KCMSD was realigned as a defendant, plaintiffs made similar allegations against it, although there has been, during the course of this litigation, a "friendly adversary" relationship between them. (*See, e.g.*, stipulations of fact, filed February 21, 1984).

The KCMSD cross-claimed only against the state for its failure to eliminate the vestiges of its prior dual school system. For additional background, see this Court's orders of June 5 and July 16, 1984.

Jurisdiction is premised on 28 U.S.C. §§ 1331, 1343(3) and (4), 136, 2201 and 2202. Plaintiffs also allege claims under 42 U.S.C. §§ 1983 and 2000d and under the United States Constitution, 14th Amendment. Declaratory and injunctive relief was sought against all defendants.

After hearing the presentation of plaintiffs' evidence and before any defense, the Court dismissed the suburban school districts. Plaintiffs simply failed to show that those defendants had acted in a racially discriminatory manner that substantially caused racial segregation in another district. *Milliken v. Bradley,* 418 U.S. 717, 745 (1974). *See* order filed June 5, 1984.

HEW was also dismissed for plaintiffs' failure to prove the agency acted with racial animus or abused its discretion in the enforcement of Title VI. See order filed July 16, 1984. The KCMSD presented its cross-claim, Missouri and HUD defended, plaintiffs and the KCMSD rebutted, Missouri presented surrebuttal and, on the 92nd day of trial, the Court refused to hear sur-surrebuttal. Thus, on June 13, 1984, the evidence ended.

The claims addressed by this order are plaintiffs' claims against the KCMSD, the State of Missouri and HUD and the crossclaim of KCMSD against the State of Missouri. For the reasons that follow, the Court finds in favor of plaintiffs against the KCMSD and the State of Missouri; in favor of KCMSD against the State of Missouri; and against plaintiffs and in favor of HUD.

THEORIES AND DEFENSES

Plaintiffs allege, and Missouri has admitted, it mandated racially segregated schools before 1954. It is plaintiffs' position that after 1954 Missouri failed to take affirmative steps to eliminate the vestiges of its prior dual school system. In fact, plaintiffs argue, Missouri acted to perpetuate racial segregation by enforcing restrictive covenants and other unfair housing practices, by discriminatorily relocating blacks who were displaced by highway development and urban renewal, and by supporting racially-identifiable interdistrict arrangements (e.g. vocational and special education area schools).

Against the KCMSD, plaintiffs claim district officials adopted ineffective policies to change the segregative patterns that were

developed or developing. In an exculpatory allegation plaintiffs allege the KCMSD could not balance the racial population of students in its district due to impaction of minorities, white flight, housing policies of other agencies and "other factors beyond the capacity of that district to manage."

(Amended complaint, May 18, 1979 ¶ 20).

Regarding HUD, plaintiffs allege the agency abrogated its affirmative duty to prevent and reduce racial segregation and instead intentionally increased segregation by failing to consider racial isolation in its site location for low income projects and locating most of the projects within the KCMSD; establishing express guidelines before 1948 requiring racial segregation and permitting such practices after that date; funding local housing agencies which did not prevent segregation in their policies or practices; and providing funds and insurance to suburban areas where access to blacks was restricted. These policies and practices, plaintiffs claim, racially impacted the KCMSD schools.

In its cross-claim against Missouri[1] the District alleges the State has not fulfilled its constitutional obligation to take action to dismantle its prior dual school system and is primarily liable for the existing segregation in the KCMSD. Not only has Missouri failed to take necessary remedial measures to eliminate past segregation but the District charges the state has acted to perpetuate segregation. To the extent the Court might find the KCMSD to be internally segregated, the District alleges the State is largely responsible for such a condition and should be required to contribute financially to any remedial plan the Court might order as relief against the KCMSD. Further, the District charges the State has caused a high concentration of economically and socially disadvantaged minority students within its boundaries,

[1]The collective designation of "Missouri" or "State" is intended to include the governor, the Missouri State Board of Education and its officers, and Arthur L. Mallory, the state Commissioner of Education.

a condition which increased student expenses and decreased the District's tax base. Concomitantly, the KCMSD alleges the State's actions or omissions caused the surrounding districts to be predominantly white.

For relief, therefore, the KCMSD seeks a court order requiring the State to propose and assist (financially and otherwise) in the implementation of a plan which will eradicate any vestiges of the State's past dual school system which includes the racially identifiable character of the KCMSD and the surrounding suburban districts.

Plaintiffs claim the only effective way to "protect and preserve" the constitutional rights of plaintiffs is to judicially mandate the "reassignment of students among all districts in the metropolitan area and/or to realign or reconstitute the defendant school districts," with compensatory payments made by the State to fund the reconstituted districts. (Plaintiffs' amended complaint, May 18, 1979 ¶ 25). Plaintiffs request defendants submit a plan to eliminate the racial identifiability of the KCMSD and other school districts in the metropolitan area. To facilitate adoption of such a plan, plaintiffs seek to enjoin federal agencies from funding state and local entities until the plan is submitted. Plaintiffs seek declaratory and injunctive relief against the federal defendants and statements from all defendants on their future plans to reduce and eradicate segregative conditions.

Missouri has argues in defense that it has met its affirmative duty to the extent of its statutory power and that local entities have the sole authority to effect the changes plaintiffs seek, e.g. redrawing district lines. Moreover, Missouri charges the racial isolation that exists is not vestiges but is the product of resegregation from natural demographic trends. Finally, Missouri argues the Kansas City area is typical of cities nationwide that had no dual school system; therefore the racial patterns cannot be attributed to the State's past conduct.

Procedurally, Missouri argues that plaintiffs and the KCMSD pleaded only interdistrict claims and seek only interdistrict relief, which claims were denied by this Court's order dismissing the suburban school districts. The Court disagrees. In its order of June 1, 1981, the Court addressed both the inter and intra-district claims raised by the KCMSD's cross-claim. Neither plaintiffs nor the KCMSD's pleadings are defective in this regard. In any event, and contrary to Missouri's allegations, plaintiffs moved to amend their complaint to conform to their contention interrogatories (filed October 17, 1983 Doc. No. 351). The Court deferred ruling the motion preferring to address the contentions individually as they arose during the trial. (Tr. 35). Insofar as plaintiffs' evidence (adopted by the KCMSD Tr. 17,275) states intradistrict claims, the motion is hereby granted.

On February 21, 1984, plaintiffs and the KCMSD entered into a stipulation of fact which the Court holds is only binding between them; however, the stipulations will be controlling, unless otherwise stated by the Court, regarding the racial composition and enrollment in the District past and present, its 1955 through 1977 "desegregation" plans, its transfer policy, the Havighurst and Hazlett reports and faculty composition. The District stipulated, *inter alia,* that before 1977 it was not a unitary district or in compliance with federal regulation. (*See, also,* Tr. 24). Nor does the District contest the HEW findings of noncompliance. It does state, however, contrary to plaintiffs' contentions, that it did not operate with discriminatory *intent* after 1954.

HUD argues in defense that it does not select the sites for low income projects and that said projects are dispersed throughout the metropolitan area in any event. HUD also maintains it does not relocate people, but merely monitors the relocation activities of other agencies and has made adjustments where necessary. Regarding FHA, the government insists there are no vestiges of its past practices and moreover that FHA's involvement in the context of all housing transactions is *de minimis.* HUD concludes it has not abused its discretion and that plaintiff's evi-

dence fails to show a causal link between schools and HUD's activities.

FINDINGS OF FACT

The State admitted and the Court judicially noticed that Missouri mandated segregated schools for black and white children before 1954. *See* Mo. Const. Art. IX, Section 1(a) (1945) (rescinded 1976) *and* §§ 163.130, 165.117 R.S. Mo. (repealed 1957). These provisions were not immediately and formally abrogated after the *Brown* decision was announced; however, the State's Attorney General issued an Opinion in 1954 declaring them unenforceable. (P. Ex. 2232). The statues were repealed in 1957 and the constitutional provision was finally rescinded in 1976. This historical background is recounted in more detail by the courts in *Adams v. United States,* 620 F.2d 1277, 1280-81 (8th Cir.) *cert. denied,* 449 U.S. 826 (1980); and *United States v. Missouri,* 363 F.Supp. 739, 746-47 (E.D. Mo. 1973) *aff'd* 515 F.2d 1365 (8th Cir.) *cert. denied,* 423 U.S. 951 (1975).

Each school district in Missouri participated in this dual school system before it was declared unconstitutional in *Brown I.* Districts with an insufficient number of blacks to maintain the state-required separate school made interdistrict arrangements to educate those children. Undeniably, some blacks moved to districts, including the KCMSD, that provided black schools. (Tr. 2043, 4557-59). As the Court previously noted, however, this movement was insignificant when compared to the total black enrollment in the KCMSD. (Tr. 1773, D. Ex. K2). Accordingly, no interdistrict constitutional violation by any suburban school district was shown. (*See* order filed June 5, 1984).

Dr. James Anderson, plaintiffs' expert historian, opined the black migration into Kansas City was from a depopulation of blacks in the surrounding three-county area moving to the city

primarily for schools. In its opinion of June 5, the Court rejected Dr. Anderson's opinions as contrary to the weight of the evidence and as being without sufficient foundation. The Court finds the greatest influx of blacks came from southern and border states and that they migrated because of a host of factors.

This in-migration coupled with a high birth rate (Tr. 16,509-10) resulted in the Kansas City black population doubling from 41,574 in 1940 to 83,740 in 1960. (*Id.*)

Before 1954, access to schools was one of many reasons some blacks chose to move into the KCMSD. (Tr. 16,688, 14,793-94, 16,691-93, 16,835). Economics and job opportunities were also major factors in black migration. (Tr. 595,600, 676-78, 713, 796, 911, 914, 1052, 1089, 1103, 1111, 1163, 1307, 1312, 1318, 1552, 1579-80, 1680-81, 1728, 2781, 3214, 3267, 18,527, 18,550, 16,842). Often jobs would pull migrants to the city and then availability of schools would influence, more specifically, what housing choice would be made within the city. (Tr. 16,688).

Dr. John Kain, plaintiffs' expert on the determinants of residential location, predicted dispersed racial residential patterns would exist in Kansas City if race were not a factor in housing choices. (Tr. 7515-7529). Dr. Kain used three indicators to predict housing choice: income, type of family, and whether there were school-aged children. (Tr. 7489, P. Ex. 1265 series). His conclusion was that absent housing discrimination blacks would be dispersed throughout the metropolitan area. (Tr. 7719, P. Ex. 1265G). Dr. Kain discounted or rejected other factors such as job location, ethnic clustering and personal preference. (Tr. 7473-76, 7846). The Court disagrees to the extent Dr. Kain rejected the possible influence of other factors in his analysis.

The intensity of segregation is demonstrated by the fact that the average black family lives in a census tract that is 85% black while the average white family lives in a census tract that is 99%

white. (Tr. 14,739, 14,745). Regardless of their motivation for coming, once here, blacks settled in the inner city or, the "principal black contiguous area." (Tr. 10,837-38, 10847-49). Plaintiffs' witnesses blame this black concentration (and ensuing white flight from it) on the dual school system, the enforcement of restrictive covenants, site and tenant selection policies for low income housing and other government practices and policies as well as on private discrimination. (Tr. 12,974, 12,976, 13,024, 13,032-13,035, 13,040-41, 13,043, 13,046-47, 13,058-62, and 13,123-24).

Not surprisingly, Missouri defended with experts whose opinions declared economics, accessibility to jobs, spacial barriers, personal preference and private discrimination were the facts affecting black movement. (Tr. 19,102, 19,104-05). They all discounted or totally rejected schools and the dual school system as having any effect. (Tr. 18,620-24, 18,627-28). To the extent those experts deny the influence of schools is housing patterns, particularly in the context of Missouri's legacy, their opinions are rejected.

The Court finds the dual housing market (Tr. 12,974-76), which still exists to a large degree today (Tr. 12,008-09, 12,339), impacted blacks in the KCMSD and consequently caused the public schools to swell in black enrollment. The Court finds there is an inextricable connection between schools and housing. "People gravitate toward school facilities, just as schools are located in response to the needs of the people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods," *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 20-21 (1971).

There were many witnesses called and literally weeks of testimony concerning the cause of blacks settling in the inner city of Kansas City and within the KCMSD. This testimony was relevant as to the suburban school districts and HUD. It was not

relevant on the claims of plaintiffs against the KCMSD and the State of Missouri because those defendants had an obligation to the black students regardless of why they settled in the school district. As will hereafter be pointed out, the Kansas City District school system had never been totally integrated. In *Davis v. East Baton Rouge Parish School Bd.*, 721 F.2d 1425 (5th Cir. 1983), the school board tried to justify its one-race schools on the basis that they resulted from demographic patterns for which the school officials had no responsibility. The Court held that the Board's argument failed, stating:

> The Board's reliance on housing patterns as justification for the continued existence of one-race schools is not only factually but legally unsound. . . .
>
> Until it has achieved the greatest degree of desegregation possible under the circumstances, the Board bears the continuing duty to do all in its power to eradicate the vestiges of the dual system. That duty includes the responsibility to adjust for demographic patterns and changes that predate the advent of a unitary system. [citations omitted]. The racial isolation of some schools, whether existing before or developing during the desegregation effort, may render disestablishment of certain one-race schools difficult or even impossible. Until all reasonable steps have been taken to eliminate remaining one-race schools, however, ethnic housing patterns are but an important factor to be considered in determining what further desegregation can reasonably be achieved; they do not work to relieve the Board of its constitutional responsibilities.

Davis, 721 F.2d at 1435. The Court, therefore, will focus on the anatomy of the KCMSD.

Plaintiffs allege the KCMSD could have done more than it did to stably integrate its schools. (Tr. 14,892-93). Plaintiffs are quick to point out, however, that the District was faced with a

pervasive system of segregation and would more than likely end up "resegregated" like all major cities. *Id.*

The Court notes that several witnesses used the term "resegregated" when describing racial change in the schools and housing patterns, usually changing from predominantly white to predominantly black. That may be correct terminology in the context of their testimony but the Court finds it has no legal significance. A segregated District cannot become resegregated until it is first integrated. The KCMSD has not yet become integrated on a system-wide basis.

As a consequence of their failure to do more, plaintiffs allege there are lingering effects of the dual school system. The District also blames the prior dual system for its present status, maintaining the State did nothing to relieve the conditions it created. Several witnesses confirmed the conclusion reached by the Supreme Court in *Brown* that forced segregation ruins attitudes and is inherently unequal: "[Segregation] may affect their hearts and minds in a way unlikely ever to be undone." 347 U.S. at 494. (Tr. 16,414, 16,416, 16,422). The general attitude of inferiority among blacks (Tr. 1,920-21) produces low achievement (Tr. 16,573) which ultimately limits employment opportunities and causes poverty. (Tr. 2,453-56, 16,414, 16,457-58). While it may be true that poverty results in low achievement regardless of race, (Tr. 16,508), it is undeniable that most poverty-level families are black. (Tr. 16,422). The District stipulated that as of 1977 they had not eliminated all the vestiges of the prior dual system. (Stipulation introduction filed 2/21/84). The Court finds the inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District.

Racial Composition of the School District: In the 1954-55 school year, 18.9% of the District's 63,487 students were black (stipulation 2, Def. Ex. K-2). Because the State compelled separate schools for blacks, the District established and main-

tained segregated facilities with segregated staffs. In 1954, the KCMSD operated 90 schools of which 14 elementary, 1 junior-high vocational school and 1 high school-junior college were for black students. (Stipulation 5, Def. Ex. K-2). Those schools were located in the black-concentrated areas (Stipulation 6) and as that community expanded in a southeast direction so did the black schools. (P. Ex. 20, 740, 741, 742 map series, 1653; Tr. 3,577-78, 12,990-92).

The white students in the District during this period attended one of the 62 elementary schools, 3 junior high schools, eight high schools (1 with a vocational school) or the junior college. (Stipulation 10, Def. Ex. K2).

The KCMSD was majority white in enrollment until 1970 (Def. Ex. K-2, Tr. 17,009), and could have achieved a mathematical racial balance in its schools until that year. (Tr. 17,010-12). Instead, the District chose to operate some completely segregated schools and some integrated ones. (Def. Ex. K-2). Regardless of some school officials' feelings that a more mathematically oriented plan would be less stable (Tr. 17,205-207), the District's chosen path was ineffective in integrating its school system.

As of 1977, 25 one-race schools under the pre-1954 system remained 90% or more of the same race. (Def. Ex. K54,. Stipulation 85, 86; Tr. 16,980). In addition, there were four black schools from the dual system that were still predominantly black when they closed in 1968. (Tr. 16,999-17,001). In summary, as of 1974, 20 years after *Brown I*, 39 schools were more than 90% black; another 38 had 10 to 90% black enrollment. Eighty percent of all blacks in the District attended schools that were 90% black; on 19% of the blacks attended a school that was 10 to 90% black. (Stipulation 84).

With the adoption of Plan 6C (discussed *infra*) in 1977, the District eliminated the 16 entirely white schools and reduced the

number of 90+% black schools to 28. (Tr. 16,567). During the 1983-84 year, no school had less than 30% black enrollment; 24 schools however are racially isolated with 90+% black enrollment. (Tr. 16,568, Def. Ex. K-2). The Court finds the District did not and has not entirely dismantled the dual school system. Vestiges of that dual system still remain.

Liberal Transfers. During the pre-1954 days, the District utilized a liberal transfer policy within each system, (Stipulation 11), allowing students to transfer to any open (uncrowded) school. (Stipulation 23, 24, 56; Tr. 16,940). Blacks did not use the liberal transfer policy as frequently as whites. (Tr. 2,010, 3,544; Stipulation 61). The Court finds the liberal transfer policy was not adopted or maintained to foster segregation even though it allowed whites living in racially transitional neighborhoods to transfer within the District to whiter schools. (Stipulation 57, Tr. 16,941-42).

Critics of the transfer policy blame its liberality for the racial turnover in schools by not compelling whites in that attendance area to attend that school. (Tr. 6,604-05; Stipulation 50, 56; P. Ex. 2780). Others, however, attribute the policy with fostering stabilization in transitional neighborhoods, slowing white flight and thus aiding integration. (Stipulation 56; Tr. 3,025-26, 13,663-64).

In the years following *Brown*, the District attempted to accommodate varying views regarding the effect of the transfer policy. (Stipulation 58, 59, 60, 61 and 62) and made adjustments in both the liberality and review of the proposed transfers. (Tr. 16,556-57). When the District proposed abandoning the liberal transfer policy in order to satisfy federal OCR officials and retain federal funds, an integrated neighborhood organization sought to enjoin the abandonment fearing it would produce more white flight. (Tr. 13,662-64). The District did however revoke the policy pursuant to OCR directives (Tr. 13,667). In 1973, race was considered in transfer requests, giving preference to transfers

that would promote integration. (Tr. 13,738). The Court finds the evolution of the transfer policy was not motivated by racial animus.

Neighborhood Schools: In response to the *Brown II* decision in 1955, the District adopted an assignment system known as the neighborhood school plan. (Stipulation 12, 13). Pursuant to this plan, the separate racial zones were eliminated and attendance areas were drawn around each school based on the buildings' capacity, distances involved, and other factors like safety, transportation and terrain. *Id.* By calculating the number of students in each attendance area, the District projected enrollment and expected racial composition for its various schools. Contrary to its predictions, many of the previously black schools opened with more than 92.5% black enrollment; 921 whites were predicted at these schools yet only 117 were present during the official census taken that fall. (Stipulation 22). White enrollment in the District decreased by approximately 1,200 between 1954-55 and 1955-56. *Id.* (P. Ex. 582, 584, 584B, 585, 586, 740, 743, 744). Because most of the schools were in racially segregated neighborhoods before 1954, the Court finds adoption of the neighborhood school concept did not substantially change the segregated school system.

Attendance Zones: Following *Brown,* the District made frequent shifts in the attendance areas of elementary and secondary schools as the population shifted, depending upon the capacity of various buildings. (Tr. 3,028; Stipulation 16 through 20, 29 through 31, 34, 37, 41, 43 and 48). In June, 1963, the District's proposed attendance zone changes were challenged by a group of residents who charged the changes would resegregate the schools and neighborhoods. (Stipulation 49). The Board in response, modified its plans and adopted a policy statement recognizing that integration was an important factor to be considered in the District's decisions. (Stipulation 50 through 52). Nevertheless, the attendance zone changes did not achieve system-wide integration.

In addition to the regular attendance zones, various "optional" zones were utilized to allow students in those areas to choose among several schools. (Stipulation 31, 34, 51). Many of those optional zones existed before 1954, (*see* P. Ex. 739, 740; maps) and continued thereafter. (Stipulation 34). Regardless of the intent, e.g. to relieve overcrowding, (Tr. 2,011-13, 16,937-38), the Court finds the use of these optional zones, coupled with the liberal transfer policy, did not aid to integrate the District; to the contrary, it allowed attendance patterns to continue on a segregated basis.

Intact Busing: From the mid-1950's through the 1970's the District was faced with overcrowded conditions. (Tr. 16,948-49; 6,583, 6,548-49, 7,305-06). Besides adjustments to attendance zones, in the mid-1960's, the District also adopted a busing program. The Board declared that the busing program was not for integration but was required to relieve overcrowded conditions at some schools. (Stipulation 53). While the Board added it would aid integration when possible, it chose to bus entire classrooms of black students to predominantly white schools but to keep them as an insular group, not allowing them to be mixed with the receiving population. (Tr. 7146-47, 8,612). In the face of civil rights protests, in 1965, the bused students were integrated into the regular enrollment. The Court finds the District's use of intact busing had a segregative intent and effect. Because the practice was stopped in the 1960's, however, no continuing violation exists. Certainly black children subjected to that experience well remember the feelings of isolation and inferiority obviously produced by the practice.

Middle School: In 1965, a bond issue was passed to build three new schools in order to relieve the overcrowding in the Central area. (Stipulation 63). Because local civil rights groups protested the proposed site locations as being segregative and ineffective to relieve overcrowding, the District hired a consultant, Dr. Havighurst, to make a report and recommendation for

the new sites. (Stipulation 64). His final report proposed, *inter alia,* a middle school at the Paseo and Brush Creek to stabilize a transitional neighborhood and retain its integrated character. (Stipulation 64, 67). After 1 1/2 years of debate, the Board rejected this portion of Dr. Havighurst's recommendations stating there was a lack of funds and it did not appear that integration could be maintained. (Stipulation 67). Some blacks viewed the District's failure to adopt the middle school as a step toward continuing the segregated school conditions. (Tr. 3017-20). The Courts finds that reasonable minds could differ as to the effect and ability of the middle school to help integrate. (Tr. 16,478-79).

Concepts for Changing Times: At the instance of several community and civil rights groups, Superintendent Hazlett, in 1968, presented a document "Concepts for Changing Times," in which various proposals for district-wide integration and stabilization were suggested. (P. Ex. 414, 414A, 2603; Stipulation 69). The Board appointed a bi-racial committee (committee of 30) to study the "Concepts" and make recommendations. The Committee generally endorsed the ideas (P. Ex. 414E through K, 2780U and V) however, the Board never voted on the proposals and none were otherwise acted upon. (Stipulation 69). In fact there was no district-wide desegregation plan adopted by the KCMSD until Plan 6C was implemented in 1977-78. *Id.*

As indicated *supra,* as the black population expanded from the central city in a southeast direction, neighborhoods and schools experienced a racial transition. As blacks moved, or were bused to the schools, in the area, whites moved out. (Tr. 8715-16, 8721-30, 9228-32, 9235). Several community groups attempted unsuccessfully, to maintain an integrated neighborhood and stabilize the often rapid transition. (Tr. 9,347-48, 9,395-96, 13,631-32).

In 1965, the Kansas City Commission on Human Relations issued proposals to stabilize the southeast area. (Stipulation 70).

Many of which were adopted by the KCMSD. Racial turnover continued unabated, however, with the efforts proving to be little more than a thumb in the dike. (Stipulation 71).

It is interesting to note that in the 1958-59 school year there were 52,491 white students in KCMSD. It had 14,952 black students which comprised 22.5% of the total enrollment. The highest enrollment in the past 30 years occurred in 1967-68 when there was a total enrollment of 74,997 students. The largest enrollment of blacks occurred in the 1971-72 school year when there was a total of 35,620 black students enrolled. In the 1983-84 school year the total enrollment in the KCMSD was 36,650 students, 10,022 whites and 24,803 blacks with a percentage of 67.7% black. The total enrollment from 1967-68 to 1983-84 has been reduced more than 50%. Enrollment of whites between 1958-59 and 1983-84 has been reduced by 80%. The black enrollment from 1971-72 to 1983-84 has been reduced by approximately 30%.

Plaintiffs contend that the State established a system of area vocational schools that effectively segregated students on the basis of their race and that the methods of funding these schools were racially discriminatory. The Court addressed this issue in its June 5 order dismissing the suburban defendants.

The Kansas City Technical Center is an AVTS for all high schools in KCMSD. It was the fist AVTS formed in the Kansas City area. It served all students in the KCMSD regardless of race. There is no proof that the formation of this school has prolonged or contributed to the segregation in the schools in the KCMSD. DESE administers vocational educational funds without regard to race and all districts are treated alike. (Tr. 17,939).

The State has been of some aid to school districts in the State which have segregation problems. When a Missouri school district received an OCR complaint, the DESE sent a letter to the district offering the department's assistance. (Tr. 17,464). A

Technical Assistance Unit (TAU) was established, funded by federal funds, which provides assistance to school districts involved in voluntary or court ordered desegregation upon a district's request. (Tr. 17,667). It also notifies the eligible districts of other services which can be provided under the conditions of the federal grants. The TAU proposal for funding to the federal government explicitly names St. Louis and Kansas City school districts as priority areas for technical assistance. (Tr. 17,684). KCMSD has requested and been provided TAU assistance. (Tr. 17,682, 17,785; St. Def. Ex. M-2).

The DESE also provides valuable assistance to urban school districts through is Urban Education Section. (Tr. 17,592-604).

Claims Against HUD

Plaintiffs have made numerous claims that the Department of Housing and Urban Development (HUD) violated its responsibilities under the Fifth Amendment of the United States Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601, *et seq.*, and the applicable housing laws and regulations.

Title VI, § 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d provides "no person in the United States shall, on the grounds of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Title VIII, 42 U.S.C. § 3601 (known as the Fair Housing Act) declares that "it is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States." The Act contains a number of detailed provisions banning discrimination on the basis of race, color, religion, sex or national origin in the sale or rental of housing, the financing of housing and the provision of brokerage services. *See,* 42 U.S.C. §§ 3604, 3605, 3606. The

Act further makes it unlawful to interfere with any person's exercise of enjoyment of these rights. 42 U.S.C. § 3617.

Before analyzing some of the myriad claims made by plaintiffs it may be helpful to briefly summarize the basic goals of the federal housing programs. The United States Housing Act of 1937, 42 U.S.C. §§ 1437-1437J, was originally enacted to remedy the unsafe and unsanitary housing conditions and the acute shortage of housing for families of low income. It authorized HUD to make loans and annual contributions to local public housing agencies (PHAs) to develop, operate and maintain low rent public housing projects for families with low income. 42 U.S.C. § 1437B-C. Congress sought to achieve this goal by vesting the responsibilities of the administration of these housing programs in local housing agencies.

Under the 1934 Act, FHA guaranteed or insured payment of residential mortgage loans for those of low income who qualified, making it possible for low income people to purchase homes with very low down payments and interest rates below the national average. In 1954 the Act was amended under 12 U.S.C. § 1751(d)(3) and (4) to provide mortgage insurance to developers, including public bodies, of multi-family rental or cooperating housing for moderate income or displaced families. The Housing Act was again amended in 1959, 12 U.S.C. § 1751(v) to make mortgage insurance available to facilitate the financing of rental housing for the elderly or handicapped.

The Act was amended in 1974 by the Housing and Community Act of 1974 which had as part of its objectives the elimination of slums and the renewal of older urban areas. 42 U.S.C. § 5301. It specifically recognized that the concentration of persons of low income in the central cities was creating social, economic and environmental problems. In 1977, 42 U.S.C. § 1439 was amended to place greater emphasis on local housing assistance plans. The primary goal of the federal housing program is to provide decent housing for the poor; however, its

secondary concern is to develop and maintain stable, desirable urban communities.

The § 235 program [12 U.S.C. § 1715(z) 1968] combined mortgage insurance with HUD mortgage subsidy payments to the lender in amounts determined by the buyer's income. The § 236 program was authorized in 1968, 12 U.S.C. § 1715(z)(1). In addition to mortgage insurance HUD provided interest subsidies to nonprofit, limited dividend or cooperative programs to reduce interest rates to an extremely low level.

Section 8, 42 U.S.C. § 1437(f), (Housing and Community Development Act of 1974) provided for rental subsidies to lower income persons by payments directly from HUD to landlords including public bodies. Under § 8 the rental subsidy is tied to the tenant not to the property. In other words the § 8 certificates are HUD's guarantee of the rental subsidy. The tenants are responsible for finding their own housing although the administering housing authority may be able to direct the certificate holder to landlords who have indicated a desire to have § 8 tenants. If the prospective landlord does not agree to participate in the program, the tenant must take the certificate somewhere else or forego the subsidy. Also if the certificate holder moves from one qualified apartment to another, the lessee takes the certificate along.

Scope of Judicial Review

Plaintiffs have not alleged nor have they jet the statutory prerequisites for filing a private action under Title VI, § 2000d *et seq.*, nor under Title VIII, 42 U.S.C. §§ 3610 or 3612, requiring such complaint to be filed within 180 days of the alleged discrimination.

Plaintiffs have properly proceeded on the basis that HUD has violated their rights to "the equal protection of the laws" as guaranteed by the Fifth Amendment of the United States Constitution. *Davis v. Passman,* 442 U.S. 228 (1979), *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388 (1971).

The standard of review for HUD's actions are the same as those for HEW which were set forth in this Court's order of July 16, 1984 (pp. 21 and 22). Briefly, there must be a showing that in administering the federal housing programs in the Kansas City area its actions were arbitrary and capricious, without a rational basis, it did so with discriminatory intent or purpose, and there is a causal connection between the violation and the injury, the segregated schools in the KCMSD. *City of Memphis v. Greene,* 451 U.S. 100, 119 (1981); *Washington v. Davis,* 426 U.S. 229, 239-241, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Aschuker v. Dept. of Housing and Urban Development,* 686 F.2d 472 (7th Cir. 1982); *Clients Council v. Pierce,* 711 F.2d 406 (8th Cir. 1983). Discriminatory purpose "implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979).

Plaintiffs claim that FHA's appraisal practices prior to 1949, and even thereafter, contributed to segregated housing in the Kansas City area. Clearly, FHA's appraisal manuals for 1936 (P. Ex. 1303) and 1938 indicated racial restrictive covenants would tend to insure a stable community thus enhancing the value of the property. In 1947 and thereafter emphasis was placed on such considerations as to whether there was a probability of a change in occupancy, that in a change from one user group to another the successor group exhibits a lower income level. The manual also pointed out that a neighborhood would probably remain more stable where there was compatibility among the neighborhood occupants. (P. Ex. 1305). By 1947 reference to racial restrictive covenants was deleted from its manual and it has refused to insure the mortgage on any property which contained such

restrictions. Insurance of mortgages by FHA incurs a risk of loss of federal funds. Racial restrictive covenants were intended to cause housing segregation. While such covenants were brought about by private action they were enforced by the courts of Missouri until after the case of *Shelley v. Kraemer,* 334 U.S. 1 was decided in 1948. Even though such covenants were discriminatory without a doubt they did have an effect on the market value of residential property. FHA did not enforce the covenants; however it accepted the fact that Missouri courts did enforce them. FHA was faced with this reality and could not ignore it in making a determination as to the maximum risk which should be incurred with funds of a federal agency. In view of this FHA did not act arbitrarily nor capriciously in giving these covenants consideration in arriving at an appraisal. As demonstrated by Ex. P. 22, the areas most affected by these covenants soon were occupied by blacks after the covenants were no longer enforceable. There was no evidence showing the number of FHA insured mortgages in the restricted areas.

Prior to 1950 FHA insured approximately 15,000 homes in the KCMSD. (Ex. FD37A). Between 1950 and 1980 there were in excess of 2,000,000 housing turnovers in this area. If FHA's appraisal practices prior to 1950 had any effect on present racial housing patterns, it would, at most, be *de minimus.*

Plaintiffs claim that HUD violated its Title VI and VIII obligations when it continued to fund the Kansas City Land Clearance for Redevelopment Authority (LCRA) after it knew that the LCRA was following racially discriminatory practices. In 1953 the LCRA was established by Kansas City Missouri to administer urban renewal programs under the Housing Act of 1949. HUD provided federal funds to assist in urban renewal and neighborhood development activities. (Ex. FD204C). After receiving the complaint that LCRA was practicing racial discrimination in its relocation activities, HUD made a Title VI complaint investigation. In that investigation HUD found that

blacks were being located primarily in the southeast part of Kansas City while whites were relocated throughout the Kansas City area. (P. Ex. 2913A). As a result of the Title VI investigation, LCRA was required immediately to cease such discriminating practices and to file reports with HUD so that HUD could monitor their referrals. The reports were to be filed with HUD every 90 days (Ex. P2913A). LCRA failed to file its reports in a timely fashion. (Tr. 11,601). The reports that were filed showed no significant improvements in LCRA's referral practices. As a result in June, 1973, HUD refused to fund the 1974 Neighborhood Development Program (NDP) unless the city assumed the responsibility for all relocation services. (Ex. FD204C). In June, 1973, HUD, LCRA and the City of Kansas City entered into a cooperation agreement by which the City assumed the responsibility for relocation under the urban renewal and neighborhood development plan. As part of this agreement each relocatee was to receive at least one referral outside of the "inner city." (Ex. FD239). The cooperation agreement required the City to file reports at least twice a month with reports to include the race of each displaced person, the number of dependents and the address of housing referrals. (Ex. FD239). Following this agreement, approximately 1/3 of the housing referrals provided to black relocatees were outside of the inner city area. (Ex. P322A, Tr. 10,991). The relocation reports show that between 1971 and 1976 only 174 black households were relocated during the six year period. (Ex. P622B). The Court finds that in working out the cooperation agreement between the LCRA and the City of Kansas City, Missouri, HUD acted in a reasonable and responsive manner. To have cut off funds would have penalized those most in need of housing, that is the people of low income, and could not have been done absent a lengthy Title VI investigation. The Court finds that by entering into the cooperation agreement between HUD, LCRA and the City of Kansas City, their actions were not arbitrary or capricious and did not violate plaintiffs' fifth amendment rights.

Title VIII. Plaintiffs contend that within the KCMSD, § 8 certificate holders are segregated by race. The Housing Authority of Kansas City (HAKC) administers the § 8 assistance program in Kansas City, Missouri in which HUD provides housing assistance payments to HAKC for § 8 participating tenants. (Tr. 12,197, 12,364). HAKC's § 8 program presently has 1,458 certificates in use with 16% white and 84% nonwhite. (Ex. P1481B). There are public housing authorities administering the § 8 assistance housing programs in Independence, Liberty and Lee's Summit, Missouri. These PHA's presently have 619 certificates in use with the racial composition 98% white and 2% nonwhite. (Ex. P1481A). By the nature of the § 8 program, participants may request a certificate from any issuing jurisdiction and then locate housing of their own choosing within the jurisdiction issuing the certificate. (Tr. 20,455). There was no evidence that HUD or the PHAs attempted to direct § 8 certificate holders as to the location of the housing which they chose.

Under the Public Housing Act of 1949, P.L. 81-171, 63 Stat. 413, Congress recognized that the problem of providing decent housing for low income families was "clearly related and practically inseparable from the problem of clearing urban slums." In other words, the 1949 Act created a slum clearance program. Congress provided loans and capital grants to clear the land and then make it available for redevelopment in accordance with locally devised plans for the area. This was reaffirmed by Congress in the 1954 Housing Act, P.L. 83-560, 68 Stat. 590. The urban renewal projects were required to be located in areas for which the community had a plan for both slum clearance and redevelopment. HAKC has nine projects for family occupancy under management containing a total of 2,270 units. (Ex. P1609). HAKC constructed seven family projects between 1952 and 1963 all either within the model cities or urban renewal areas. (Ex. P2917). The Housing Authority had two other family projects containing 50 units each consisting of single family homes located throughout Kansas City, Missouri. (Ex. P1609).

At the outset HAKC followed the "freedom of choice plan." In 1968 HAKC adopted a new assignment plan in accordance with HUD regulations which required applicants to select a suitable vacant unit from among the three development locations with the highest vacancy rate or be removed to the bottom of the waiting list. (Ex. P1596FFF). In 1976 HUD made a Title VI investigation of HAKC's assignment practices. It found that HAKC was allowing applicants to choose a suitable vacant unit in any development rather than giving a choice only of a unit among the three developments with the highest vacancy rate. (Ex. P1596FFF). Following the investigation, HAKC and HUD entered into a compliance agreement in which HAKC adopted a new tenant assignment policy. This policy required that applicants be assigned to suitable units at one of the three developments with the highest vacancy rate. In addition it provided for a minority preference housing option. This feature of the plan allowed for the immediate placement of any applicant or transfer of any resident to a development in which the applicants or tenants racial group comprised 33 1/3% or less of the development's population. (Tr. 12,225, Ex. P1596GGG). The Court finds that the location of the public housing was in accordance with the congressional acts and that HUD's monitoring of the program was neither arbitrary nor capricious and that the compliance agreement entered into between HAKC and HUD was reasonable.

Plaintiffs also contend that HUD assisted multi-family housing caused the overwhelming majority of these units to be located within the KCMSD. The Court finds that HUD followed a balanced housing policy and attempted to insure that assisted housing located in the inner city area was balanced by assisted housing projects in the suburban areas. (Tr. 20,657). HUD reviewed all proposals for multi-family housing projects to include racial characteristics of the project area. (Tr. 20,408-09). HUD had disapproved some proposed projects because they were located in areas of minority concentration. (Tr. 20,563-68).

The evidence indicates that there has not been a lack of balance between federally assisted housing within the KCMSD and the suburban areas. Plaintiffs' Exhibit 27B reflects that there were 6,832 HUD insured or subsidized multi-family units within KCMSD and 9,872 such units in the 11 suburban school districts (which have been dismissed in this action). This indicates that HUD did follow a balanced housing policy. HUD published site selection regulations known as "Project Selection Criteria", 24 C.F.R. § 200.700 *et seq.* Without setting forth the criteria, they were sufficient to enable HUD to make a reasonable determination that a particular project was in compliance with Titles VI and VIII. There was no evidence in the case that the practices of HUD in site selection and approval for federally subsidized multi-family housing had a substantial effect upon the racial makeup of schools within the KCMSD. A good example is the East Hills Village located in the Knotts Elementary School attendance zone. The East Hills Village project was approved by HUD in 1971. (Ex. P27B). In 1971 when the project was approved by HUD, Knotts School was 84% black and in 1973 when the East Hills Village project was opened, Knotts School was 91.9% black. (Ex. K-2). When East Hills Village opened there were 30 elementary school age children, 27 black and 3 white. (Ex. P1199). Ten percent of the children were white, ninety percent were black. The black percentage was higher in Knotts School than that reflected in the East Hills Village project.

Although the evidence showed that HUD assisted housing was not concentrated within KCMSD, plaintiffs nevertheless asserted that most blacks who resided in assisted housing lived within the KCMSD. Even assuming that this is true, it does not show a Title VIII violation on the part of HUD. HUD established affirmative marketing regulations, 24 C.F.R. § 200.600, 841.202 and 880.206, and the evidence reflects that the Kansas City HUD office monitored these affirmative fair housing and marketing plans very closely. A detailed description of HUD's review and

monitoring of the affirmative fair housing marketing plans was provided by Elaine Owens. (Tr. 20,413-431; 20,516-521). Each project sponsor was required to establish an "anticipated occupancy goal" for tenants which was both realistic for the project area and which would provide greater integration than the current racial mix of the area. (Tr. 20,419, 20,516-17). The review also assured that advertising and contact with the community groups were adequate to reach persons who would not otherwise be expected to apply for such housing. (Tr. 20,415-19). Its review involved a pre-occupancy conference with the sponsor to discuss the provisions of each marketing plan and how the plan was to be implemented as well as an appraisal of the sponsor's past affirmative marketing experience. (Tr. 20,420-23). With respect to HUD's monitoring of the plans, sponsors were required to submit monthly occupancy reports until the project was 95% occupied. Thereafter, occupancy reports were to be submitted annually. (Tr. 20,423-24). HUD also monitored the Equal Housing Opportunity Plans under § 8 housing programs. (Tr. 20,431-33). Generally its efforts were designed to insure that participating § 8 certificate holders were made aware what affordable housing was available to them throughout the entire community and that the public housing authorities informed them of their rights under the fair housing laws. HUD made annual monitoring visits to all PHAs in the Kansas City area that administered § 8 programs. (Tr. 20,453-54). Undoubtedly the affirmative fair housing marketing plans did not result in the integration which HUD desired; however, this was not the result of the lack of affirmative marketing efforts. A good example was the evidence concerning Parvin Estates which was located in predominantly white north Kansas City. (Tr. 12,542-43). Mrs. Ruth Sechter testified at length concerning the marketing plans imposed in the development of Parvin Estates. She stated that the plan had been successful in making blacks aware of the openings at Parvin Estates but they were unsuccessful in attracting the expected number of black families to the project.

She attributed this to reasons that were beyond the sponsor's control and not the fault of the plan. (Tr. 12,582). This project contained 300 units; however in spite of the affirmative marketing efforts, they were never able to attract more than 12% minorities. The occupancy rate for blacks was actually lower. (Tr. 12,562). Certainly there was nothing about the marketing regulations or the manner in which they were implemented and monitored which was arbitrary or capricious.

Plaintiffs also asserted that blacks were routinely denied FHA mortgage insurance well past 1954. There was no evidence whatsoever to support plaintiffs' contentions in this regard. Mr. Newsome, with 23 years experience as a real estate agent, was not aware of a single instance in which FHA had refused to insure a mortgage loan because of race. (Tr. 9,439, 9,517). The only evidence on the issue was to the effect that race was not a factor in HUD's decision to insure a home mortgage loan. (Tr. 19,925-26, Treu Depo. at 60; James Depo. at 15). Since 1962 FHA has required a certification of compliance with its nondiscrimination policy by all lenders, buyers and sellers. (Ex. FD45A & B, 46A & B, and 350 [*see* 24 C.F.R. § 200.300 *et seq.*]).

Plaintiffs also claimed that there was racial discrimination in the sale of homes in which the FHA insured mortgage had been foreclosed. Plaintiffs maintain that many management brokers maintained separate lists of these homes, one for whites and one for blacks, and presold homes in white areas to whites to avoid the possible purchase by blacks. The evidence reflected only one instance in which this occurred. Ms. Dorothy Davis testified that in 1966 Mr. Homer Ritch, a management broker agreed to sell property to her several days before it was advertised to the general public. (Tr. 11,730). HUD investigated Mr. Ritch's conduct which resulted in an official reprimand by HUD and a nonrenewal of his contract to manage HUD properties. (Tr. 11,746). HUD immediately altered the manner in which such homes were sold to prevent any future occurrences of preselling.

(Tr. 11,732-33). Under the new procedure, all proposals for the sale of HUD owned properties had to be submitted directly to HUD not to management brokers and no proposals were received until the Monday following the Thursday advertisement of the property. (Tr. 11,732-33). The most detailed evidence concerning HUD's property disposition was in the deposition testimony of Jaspar Levine, the Director of HUD's property disposition branch between 1965 and 1979. Summarily, he testified that HUD maintained the property in good condition so that they would not blight the neighborhoods. (Levine Depo. at 26). When title to the property was acquired by HUD, a repair list was prepared, contracts were let for the repair, and the repair work was performed. (Levine Depo. at 27,31). If property remained unsold for a period of 30 to 60 days, it was normally taken off the market, further repaired and re-advertised for sale. (Levine Depo. at 28). Homes that needed only minor repairs were offered for sale in an "as is" condition. (Levine Depo. at 26). The evidence showed that HUD held properties were available for sale to all members of the general public regardless of race. (Tr. 11,726, Levine Depo. at 79). Properties held for sale were advertised in the Kansas City Call, a black newspaper, and the Kansas City Star and Times. (Tr. 11,726-27). A list of HUD held homes that were ready for sale was regularly mailed to all interested persons. (Tr. 11,727). The evidence does not support plaintiffs' contention that HUD's practices in the sale of homes on which its insured mortgages had been foreclosed was racially discriminatory.

There was evidence that some HUD held homes in the Southeast Corridor were allowed to deteriorate and fall in disrepair. Assuming the accuracy of this testimony there was an absence of any evidence to support a finding that such neglect of the property by HUD was because of racially discriminatory intent or purpose.

Various State Agencies

Plaintiffs contend that the following state agencies had an opportunity to reduce the impaction of blacks and minorities in the inner city of Kansas City: the Missouri Housing Development Commission, the Division of Finance, Division of Savings and Loan Supervision, the Division of Insurance, the Missouri Real Estate Commission, and the Missouri Commission on Human Rights. In view of this Court's finding that the State had an obligation under the fourteenth amendment to assure that blacks within the KCMSD were not denied the equal protection of the laws regardless of why they settled within the KCMSD, the evidence concerning the aforementioned state agencies will be addressed only very briefly.

Plaintiffs contend that the State and particularly the Missouri Department of Highway and Transportation (MDHT) have managed its relocation program for persons displaced by highway projects in a manner that had a racially segregative effect. Their main complaint was the location of the I-70 route which was first chosen in 1956 when the interstate system took effect (Tr. 18,243) and at a time when the KCMSD was overwhelmingly white. (Def. Ex. K-2). I-70 was financed by both federal and state funds (Tr. 18,243). I-70 generally followed the route of what was previously U.S. Route 40 (Tr. 18,248) and was chosen to serve the existing traffic patterns as they then existed and were anticipated to continue. The I-70 project had to be approved by the Federal Highway Administration. (Tr. 18,246). Planning for this project was generally approved by various agencies of the city government. (Tr. 18,246-47). It goes without saying that the location of a highway and particularly an interstate highway through a residential area will displace a certain number of residents in that area. There is no proof whatever that the State's action as it related to the construction of the I-70 project amounted to any constitutional violation.

Plaintiffs contend that in its relocation program for the South Midtown Freeway (SMF), MDHT managed its program in a manner which resulted with blacks who were displaced being located in areas which were predominantly black and the whites being located in suburban areas which were predominantly white. The Court finds that the location for the SMF generally followed existing patterns of traffic and was probably the most feasible and reasonable location for the freeway and insofar as the freeway location was concerned, there was no constitutional violation on the part of the State. (Tr. 18,258). Again, the plans for the freeway had to be approved by the federal government. (Tr. 18,298). It was necessary for a relocation plan to be prepared and submitted to the U.S. Department of Transportation for approval for funding. (Tr. 18,032-33). Relocatees who requested assistance from MDHT were assisted in finding replacement housing. (Tr. 18,028). Relocation payments were authorized by the Uniform Relocation Act of 1970. (Tr. 18,019). On the initial contact, the relocatees completed a questionnaire which included the relocatee's preference for relocation. (Tr. 18,019-20). The relocatees did receive financial assistance dependent upon their circumstances. (Tr. 18,021-27). Relocatees were told to contact MDHT if at any time they felt they were the victims of discrimination but no such complaints were ever received by MDHT. (Tr. 18,031, 18,043). Generally, MDHT advised relocatees of the availability of houses and did not refer them to realtors for this purpose. (Tr. 18,032, 18,041, 18,042).

The State contended that plaintiffs' claims that the State's location of highways and its management of its relocation programs were racially discriminatory should have been dismissed and no evidence on these issued admitted because the United States Department of Transportation was dismissed and the Highway Department for the State of Missouri was not a party. Without deciding the issue as to whether these claims should have been dismissed, the Court finds that there was

nothing in the location of the highways nor in the operation of the MDHT's relocation program which amounted to a constitutional violation and for which the State of Missouri would be liable.

Plaintiffs claim that the State through the Missouri Housing Development Commission (MHDC) engaged in the implementation of federal housing programs which contributed to the creation and perpetuation of a dual housing market in the metropolitan Kansas City area. MHDC was created by the Missouri legislature in 1969 to provide loans to middle and low income persons. (Tr. 18,306-07). MHDC does not build or manage any developments but simply provides financing. (Tr. 18,307).

Its first financial commitment was on December 15, 1971 which was for three developments including Parvin Estates located in the North Kansas City Missouri School District. (Tr. 18,309). MHDC funds come from a sale of tax exempt bonds which provide the necessary proceeds for making loans to developers or in the case of single family programs to individuals to purchase mortgages under the single family home loan program. (Tr. 18,310-11). MHDC received no federal funding but has been requested to administer certain section 8 housing assistance contracts and as a result receives funding directly from HUD in which MHDC acts as a conduit to distribute these funds to eligible mortgagors who in turn make principal and interest payments to MHDC. (Tr. 18,310-13). Nearly all projects in which MHDC participated are federally insured, either FHA or VA, and in some instances private mortgage insurance guarantees. (Tr. 18,315). There was considerable evidence concerning the type of federally insured projects in which MHDC was involved; however, the Court sees no particular advantage in reviewing those projects in detail. State Exh. C-12 reflects the projects in which MHDC was involved and the location of those projects. It clearly appears that the majority of the units in which it was involved were located outside the KCMSD.

Plaintiffs and the KCMSD offered evidence of the alleged past racially discriminatory practices of private individuals in the fields of real estate, residential and commercial, financing, insurance and public accommodations. They seek to hold the state responsible for these activities because real estate brokers, banks, savings and loan institutions, insurance companies and other entities claimed to have been engaged in this practice receive licenses from and are subject to regulation by the State of Missouri. There is no doubt that private entities did engage in discriminatory practices such as red lining, steering and blockbusting. As stated the discriminatory acts were committed by private individuals or entities. The only complaint involving illegal activities of realtors which was filed with the Missouri Real Estate Commission led to the permanent revocation of the real estate license of the agent involved. (Tr. 12,257-58). Other complaints were filed with the Kansas City Human Relations Committee which did receive an affirmative response from that committee. (Tr. 4721 and 4711-12). The mere fact that activities of these private individuals or entities were either licensed by or subject to regulation by a state agency does not convert the private action into state action for which the State of Missouri would be liable. However, private action may, in law, become state action when the state has exercised coercive power or has provided significant encouragement for the private discriminatory activity. This is clearly the teaching of the following cases without any further discussion concerning the holding in those cases: *Moosehead Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.E.2d 627 (1972); *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 LE2d 534 (1982) and *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 LE2d 418 (1982). There was no evidence whatsoever that the state agencies exercised coercive power or significantly encouraged the private individuals or entities in their discriminatory practices so as to make their actions the actions of the State. While these agencies, acting within the authority granted them by the General Assembly,

committed no constitutional violation, the State could have given those agencies obligations and authority which could have aided in the disestablishment of the dual school system which it created. This Court cannot say what precise course the State should have taken at any particular stage in meeting its affirmative duty to disestablish the dual system; however, by acting through these agencies, it could have at least partially met that duty. A finding that none of the aforementioned agencies committed any constitutional violation entitling plaintiffs to relief does not dispose of the question concerning the State's liability.

In the past the State has taken positive actions which were discriminatory against blacks. As previously stated, it mandated separate schools for blacks and whites; it established separate institutions for teaching black school teachers, § 10632 R.S. Mo. (1939); it established and maintained a separate institution for higher education for blacks at Lincoln University, § 175.050 R.S. Mo. (1949); it provided that school boards in any town, city or consolidated school district could establish separate libraries, public parks and playgrounds for blacks and whites, § 165.327, R.S. Mo. (1959); it made it a crime for a person of 1/8 Negro blood to marry a white person, § 563.240 R.S. Mo. (1959); and its courts enforced racially restrictive covenants. These actions had the effect of placing the State's imprimatur on racial discrimination. It created an atmosphere in which the private white individuals could justify their bias and prejudice against blacks. A large percentage of whites do not want blacks to reside in their neighborhood and a large percentage of blacks do not want to reside within a neighborhood in which they are not wanted. This has and continues to have a significant effect on the dual housing market in the Kansas City area. Thus, the Court finds that the State has encouraged racial discrimination by private individuals in the real estate, banking and insurance industries. Liability on the part of the State might be a very close question if it hinged solely on its encouragement of private discrimination. There is

a much more salient reason for finding liability on the part of the State.

The KCMSD did not mandate separate schools for blacks and whites. The people of the State of Missouri through constitutional provision and the General Assembly through legislative enactments mandated that all schools for blacks and whites in this State were to be separate. There is no room for doubt but what the State of Missouri intentionally created the dual school system. Under *Brown I, Brown v. Board of Education,* 347 U.S. 483, (1954), this constituted a violation of the 14th amendment of the United States Constitution and no further proof of segregative intent is required. *Brown v. Board of Education*, 349 U.S. 294 (1955) *(Brown II), Swann v. Charlotte-Mechlenburg Bd. of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *Green v. School Board of New Kent Co.*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. 1984) and other cases decided by the Supreme Court and the various circuit courts clearly demonstrate that having created a dual system, the State and the KCMSD had and continue to have an obligation to disestablish that system. In *Keyes v. School District No. 1, Denver, Colo.*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), the Court stated:

> [W]e have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in *Brown v. Board of Education* 347 U.S. 483 (1954) (*Brown I*), the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system.' *Brown v. Board of Education*, 349 U.S. 294, 301(1955) (*Brown II*).

Keyes, 413 U.S. at 200. In *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 99 S.Ct. 2971, 61 L.Ed.2d 720 (1979), the Court stated:

> But the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.

Dayton, 443 U.S. at 538. Having found that there are still vestiges of the State's dual school system still lingering in the KCMSD, the obligations of the KCMSD and the State have not been met.

The State argues that under the Constitution of the State of Missouri and the statutes of the State, it was unable to take any affirmative action to dismantle the KCMSD's dual school system. In the general memorandum and order filed June 5, 1984, in discussing the local autonomy of public schools within the State of Missouri, it was stated at page 8: "The State of Missouri does not have the power to require a merger or consolidation of school districts." This statement by the Court was intended to reflect that the state statutes had vested that power in the school districts and had not retained it for the State. It is the conclusion of this Court that none of the provisions of the Constitution nor statutes of the State of Missouri would have prevented the State of Missouri from fulfilling its affirmative duty of disestablishing a dual school system subsequent to 1954. Article 9, § 1(a) of the Missouri Constitution requires the General Assembly to establish and maintain free public schools; Article 9, 5 1(b) provides that schools for any contiguous territory may be established by law. Article 3, 5 40(20) provides that the General Assembly shall not pass any local or special law "creating new townships or changing the boundaries of townships or school districts." There is nothing in the State Constitution which would prevent the General Assembly from enacting legislation which would give the State sole authority to establish school districts as it sees fit. If such legislation is the only means by which the State can fulfill its 14th amendment obligations, then such legislation is mandatory. It is clear that school districts in the State exist pursuant to the State Constitution and it is also clear that the General Assembly for the State of Missouri may abolish or create districts subject only to the requirement that the territory within the district must be contiguous and subject only to the provision that such may not be done except by general legislation as opposed to special legislation. The General Assembly established the school districts and if it deems necessary, can change them even though to do so might require amendments of some of the present statutes. In this regard the General Assembly has authority which this Court does not have. The teachings of *Milliken v. Bradley,* 418 U.S. 717, as analyzed in *Hills v. Geautreaux,* 425 U.S. 284 (1976) were to the effect that a federal court had no power to restructure the operation of local and state government entities absent a constitutional violation by those entities. Article 1, § 3 of the Missouri Constitution provides that the people of the State have the inherent, sole and exclusive right to alter or reform government whenever they deem it necessary. Article 1, § 4 of the Constitution acknowledges that it is a free and independent state subject only to the Constitution of the United States. Thus it recognizes that its laws must conform to the United States Constitution. As stated in *Milliken I,* "no state law is above the Constitution."

In *Cooper v. Arron,* 358 U.S. 1, 19 (1958), it was stated:

> It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no

> State shall deny to any person within its jurisdiction the equal protection of the laws.

In *Board of Education v. Swann*, 402 U.S. 43, 45 (1971), the Court stated:

> [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

Even if the hands of state administrators such as the Commissioner of Education, the State Board of Education, or other agencies were "tied" by state statutes, the State as a collective entity cannot defend its failure to affirmatively act to eliminate the structure and effects of its past dual system on the basis of restrictive state law. The State executive and its agencies as well as the State's General Assembly had and continue to have the constitutional obligation to affirmatively dismantle any system of de jure segregation, root and branch. This obligation is parallel with the obligation of the KCMSD. This case is before this Court simply because the KCMSD and the State have defaulted in their obligation to uphold the Constitution.

Having found that there are still vestiges of the dual school system in the KCMSD, the Court finds the issues in favor of plaintiffs against the KCMSD and the State of Missouri and it further finds the issues in favor of the KCMSD against the State of Missouri. Since these defendants have failed to comply with their constitutional obligations, this Court not only has the power but the duty to enter a decree which will correct the continuing effects of past discrimination as well as bar discrimination against blacks in the future. *Louisiana v. United States*, 380 U.S. 145, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965).

The issues of liability and remedy have previously been bifurcated by this Court. Therefore at this time the Court makes no determination as to what remedy should be decreed nor a determination at this point whether or not the case should be opened for additional discovery and later a trial on the remedy issue. The Court is of the opinion that the initial step which should be taken in regard to remedy would be the preparation and submission of a plan which might obtain the approval of the parties involved as well as the approval of this Court.

Since the State under its Constitution has the duty to establish and maintain free public schools, it has the primary responsibility for insuring that the public education systems in the State comport with the United States Constitution. The State Board of Education and the KCMSD Board of Education have much more expertise than this Court in the operation and management of public schools within this State. The KCMSD Board more clearly understands the facilities which are available within its system, the extent to which some school facilities are overcrowded while others are not or may even be vacant. It understands the problems of the transportation of students to and from the various school facilities and it more fully understands the administrative problems with which it is faced than this Court does; therefore, the State Board of Education and the KCMSD Board of Education are hereby directed to prepare a plan which would establish a unitary school system within the KCMSD. In doing so, they should concentrate on the schools in which the student enrollment is more than 90% black. They should also, to the extent possible, see that students are permitted to attend a school nearest the student's home so long by so doing it does not deter from properly integrating the students in the KCMSD. They should also bear in mind cost factors as well as the purpose of the public schools in this state, that is to furnish quality education to its students. While the Court does not intend to limit matters which should be considered to those enumerated above,

it does suggest that the above are some considerations which should be kept in mind. It is also the Court's opinion that much of the cost for preparing and implementing a plan to dismantle the vestiges of a dual school system in the KCMSD should be borne by the State. The Court would invite the two Boards to follow the teachings of the United States Supreme Court in regard to appropriate remedies as set forth in *Keyes v. School District No. 1, Denver, Colo., supra; Green v. School Board of New Kent Co., supra;* and *Swann v. Charlotte-Mechlenburg Bd. of Education, supra*. The Court further directs that such a plan be submitted to the Court within ninety (90) days from the date of this order. Plaintiffs will be given thirty days after the plan is filed in which to file any written objections to it. Upon the submission of such a plan, it may be determined at that time whether or not an additional hearing should be held and evidence received in regard to a remedy.

Accordingly, it is hereby

ORDERED that the Clerk is directed to enter judgment on the issue of liability in favor of HUD and against plaintiffs; in favor of plaintiffs and against the State defendants and the KCMSD; and in favor of the KCMSD and against the State defendants on its cross-claim; and it is further

ORDERED that within ninety (90) days from the date of this order, the State Board of Education and the KCMSD Board of Education are directed to submit a proposed plan which will have the effect of removing the vestiges of the dual school system as it presently exists in the KCMSD; and it is further

ORDERED that plaintiffs shall have thirty (30) days after the proposed plan is filed in which to file objections to it.

/s/ Russell G. Clark
UNITED STATES
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: September 17, 1984

APPENDIX B

UNITED STATES DISTRICT COURT
W.D. MISSOURI, W.D.

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

v.

STATE OF MISSOURI, et al.,
Defendants.

June 14, 1985

Arthur A Benson, II, Benson & McKay, Kansas City, Mo., and James S. Liebman, and Theodore M. Shaw, NAACP Legal Defense & Education Fund, New York City, for plaintiffs.

James Borthwick, Shirley Keeler, Blackwell, Sanders, Matheny, Weary & Lombardi, Kansas City, Mo., and Allen R. Snyder, Hogan & Hartson, Washington, D.C., for defendant KCMSD.

Bartow Farr, III, Onek, Klein & Farr, Washington, D.C. and Ann Wheeler, Asst. Atty. Gen., Jefferson City, Mo., for defendant State of Mo.

Michael Gordon, Kansas City, Mo., for intervenor Amer. Fed of Teachers.

MEMORANDUM OPINION

RUSSELL G. CLARK, Chief Judge.

INTRODUCTION

The function of a remedial plan in a school desegregation setting is to make the constitutional ideal of equal justice under the law a "living truth." *Cooper v. Aaron*, 358 U.S. 1, 20, 78 S.Ct.

1401, 1410, 3 L.Ed.2d 5 (1958). The basic remedial principle, repeatedly articulated by the courts in school desegregation cases, is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 3127, 41 L.Ed.2d 1069 (1974) (*Milliken I*); *Columbus Board of Education v. Penick*, 443 U.S. 449, 465, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 420, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851 (1976); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971). Further, the goal of the remedy is to prohibit new violations and eliminate the continuing effects of prior violations. *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965); *Keyes v. School District No. 1*, 413 U.S. 189, 200, 93 S.Ct. 2686, 2693, 37 L.Ed.2d 548 (1973); *Green v. County School Board*, 391 U.S. 430, 437-38 and n. 4, 88 S.Ct. 1689, 1693-94 and n. 4, 20 L.Ed.2d 716 (1968).

The principles that have guided this Court in implementing a desegregation plan for the KCMSD are clear. "In fashioning, and effectuating (desegregation) . . . decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown v. Board of Education*, 349 U.S. 294, 300, 75 S.Ct. 753, 756, 99 L.Ed. 1083 (1955) (*Brown II*). However, a consideration of those practicalities does not mean that the vindication of constitutional rights can be denied on "any theory that it is less expensive to deny than afford them." *Watson v. Memphis*, 373 U.S. 526, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963).

Further, the goal of a desegregation decree is clear. The goal is the elimination of all vestiges of state imposed segregation. In achieving this goal, the district court may use its broad equitable powers, recognizing that these powers do have limits. Those

limits include the nature and scope of the constitutional violation, the interests of state and local authorities in managing their own affairs consistent with the constitution, and insuring that the remedy is designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct. *Morrilton School District No. 32 v. U.S.*, 606 F.2d 222, 229 (8th Cir. 1979), *cert. denied,* 444 U.S. 1071, 100 S.Ct. 1015, 62 L.Ed.2d 753 (1980).

In reviewing the plans presented by the parties, the evidence presented during the hearing, and this Court's findings of constitutional violations, it is clear that "[t]he remedial portion of a school desegregation case is unlike that of any other variety of litigation and conceivably can surpass the liability portion in terms of complexity and duration." *Armstrong v. Board of School Directors of City of Milwaukee*, 616 F.2d 305, 324 (7th Cir. 1980). Therefore, the establishment of liability is only the beginning. "The precise remedy does not follow logically from the determination of liability, but rather reflects a careful reconciliation of the interests of many affected members of the community and a choice among a wide range of possibilities. The nature of the litigation does not lend itself to complete success by one side or the other." *United States and South End Education Committee v. Board of Education of Waterbury*, 605 F.2d 573, 576-77 (2d Cir.1979).

This Court recognizes that implementation of this plan will be difficult. "The pain of transition is an unfortunate, but inevitable result of deliberate policies which have isolated black Americans from the schools . . . of white Americans." *United States v. School District of Omaha,* 521 F.2d 530, 546 (8th Cir.), *cert. denied,* 423 U.S. 946, 96 S.Ct. 361, 46 L.Ed.2d 280 (1975).

Since the minority students in the KCMSD are the victims of racial discrimination which was mandated by the Constitution and statutes of the State of Missouri, it is only equitable to place the greatest burden of removing the vestiges of such discrimination and the continuing effects of same on the State rather than on those who are the victims.

"All, regardless of race or class or economic status, are entitled to a fair chance and to the tools for developing their individual powers of mind and spirit to the utmost. This promise means that all children by virtue of their own efforts, competently guided, can hope to attain the mature and informed judgment needed to secure gainful employment, and to manage their own lives, thereby serving not only their own interests but also the progress of society itself." *A Nation At Risk: The Imperative for Educational Reform* at p. 1 (1983) (hereinafter cited as *A Nation at Risk*). Segregation in KCMSD has resulted in this promise going unkept.

Measures requiring educational improvements have been incorporated into many desegregation remedies. *Milliken v. Bradley*, 433 U.S. 267, 279-88, 97 S.Ct. 2749, 2756-61, 53 L.Ed.2d 745 (1977) (*Milliken II*); *Morgan v. Kerrigan*, 530 F.2d 401, 427-30 (1st Cir.), *cert. denied,* 426 U.S. 935, 96 S.Ct. 2648, 49 L.Ed.2d 386 (1976); *Tasby v. Wright*, 520 F.Supp. 683, 741-43 (N.D.Tex. 1981); *Oliver v. Kalamazoo Board of Education,* 640 F.2d 782, 787 (6th Cir. 1980); *United States v. Board of School Commissioners*, 506 F.Supp. 657, 671-72 (S.D.Ind.1979), *aff'd in part, reversed in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 499 U.S. 838, 101 S.Ct. 114, 66 L.Ed.2d 45 (1980); *Liddell v. Board of Education,* 491 F.Supp. 351, 357 (E.D.Mo.1980), *aff'd*, 677 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 629 (1981) (*Liddell III*). The use of ancillary programs to improve the educational quality of a school district in desegregation remedy is based upon the federal district's "duty to render a decree which will so far as possible eliminate the discriminatory effects of the past. . . . ." *Haney v. County Board of Education,* 429 F.2d 364 (8th Cir. 1970), *quoting Louisiana v. United States,* 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). No party to this case has suggested that this plan should not contain components designed

to improve educational achievement. In fact, it is "appropriate to include a number of properly targeted educational programs in a desegregation plan" (State Plan at 5). This is true because "individuals in our society who do not posses the levels of skill, literacy, and training essential to this new era will be effectively disenfranchised, not simply from the material rewards that accompany competent performance, but also from the chance to participate fully in our national life." *A Nation at Risk* at p. 7. The difficult question which remains is, which programs are appropriate to remedy the ill effects of the unconstitutional segregation and to attract and maintain non-minority enrollment.

Segregation has caused a system wide reduction in student achievement in the schools of the KCMSD (testimony of Dr. Daniel Levine, testimony of Dr. Eugene Eubanks at pp. 22, 376-79). Test results from the Iowa Test of Basic Skills in grades 1 through 6 show that there are only a few elementary schools of the 50 in the KCMSD which are presently performing at or above the national norm in reading and mathematics. This is especially true in regard to the basic skill of reading (P.Ex. 3781). (The Court is aware that there may be substantial improvement on the tests for the current year.) The testimony of all the educational experts including Dr. Daniel Levine, Dr. Eugene Eubanks, Dr. Herb Walberg, Dr. Joan Abrams, Carla Santorno, Dr. Joseph Barderick, and Dr. Willis D. Hawley, confirm that this situation is correctable and that the schools in KCMSD, when provided with adequate resources, sufficient staff development, and proper teaching methods, can attain educational achievement results more in keeping with the national norms (see specifically the rebuttal testimony of Dr. Daniel Levine stating that the goal of the KCMSD Plan was to raise the average achievement level for elementary students in the area of reading to the national norms within 4 to 5 years and to bring the passing rate at the secondary level for the BEST test from 51% to a 90 to 95% pass rate).

Both the State of Missouri and the KCMSD have proposed program components designed to increase student achievement at the elementary and secondary levels (KCMSD Plan at pp. 19-33; State Plan at pp. 16-43, and 108-09). The approach taken by KCMSD on the elementary level includes the implementation of an early language development program (KCMSD Plan p. 22, 23), 24 transition rooms in elementary schools for students who would normally be retained in kindergarten or third grade (KCMSD Plan p. 23, 24), the hiring of additional elementary school counselors and home school liaison officers in all low achieving elementary schools (KCMSD Plan at p. 21), the expansion of computer assisted and computer managed instruction (KCMSD Plan p. 31-34), the implementation of a "Writing to Read" project (a computer program designed for kindergartners) (KCMSD Plan p. 32), the implementation of a computer home loan program (KCMSD Plan p. 33) and what KCMSD calls an "Effective School" project which would make available up to $100,000 for each elementary school with reading levels below national average (KCMSD Plan p. 21). This means that 41 of the 50 elementary schools in the KCMSD would be receiving these funds (KCMSD Exh. K-95). The Effective School project attempts to address the individual needs of the elementary schools on the school level. Local parents, patrons, teachers and principals would be involved in determining how these resources may be spent in order to increase the student achievement level in that school, especially in regard to reading. A similar program has been implemented in six predominantly minority schools in the KCMSD. It has shown significant promise as a means of remedying many of the educational problems which go hand in hand with racially isolated minority student populations (testimony of Dr. Daniel Levine at pp. 22, 132-49, testimony of Dr. Eugene Eubanks at pp. 22, 376-79).

The State proposal for improving student achievement on the elementary level is the implementation of an "Instructional Management System." This system is a modification of a teach-

ing approach entitled "Mastery Learning" (State Plan at p. 43). Mastery learning, as defined by Dr. Joan Abrams and Carla Santorno, in testimony during the remedial hearing, is an instructional technique in which the teacher prepares a lesson plan and presents material to the class, following presentation of the material the teacher conducts testing or evaluation to determine which students have mastered the material, then the teacher establishes lesson plans which are more individualized with one group of students receiving enrichment, while the other group of students, who have not yet mastered the material, will receive remedial lessons until they do master the material. This technique has proven successful in school districts undergoing desegregation as well as those which were not (testimony of Dr. Daniel Levine, Dr. Herb Walberg, Dr. Joan Abrams, Carla Santorno).

The KCMSD proposal for improving achievement on the secondary levels includes: the implementation of pre-collegiate courses and career counseling (KCMSD Plan pp. 25-27, 29-30); the implementation of alternative secondary education programs (KCMSD Plan at 27-28), including in-school suspension rooms, transition rooms for the ninth grade, alternative schools for alienated youth, computer laboratories and a reform and reorganization demonstration project similar to the effective elementary school project in which the 18 secondary schools would be budgeted approximately $100,000 per school with the determination as to how those funds should be allocated based upon recommendations of patrons, parents, teachers and the local principal.

The State proposes to implement pre-collegiate courses and an occupational and career education program in the 90% plus black schools (State Plan at 109). No other specific proposals are made by the State as part of an attempt to improve achievement at the secondary education level, however, other components in its plan, as in the KCMSD Plan, allow for programs which would be aimed at improving achievement.

In addition to these programs to increase student achievement, both the State of Missouri and the KCMSD endorse achieving AAA status, reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs.

IMPROVING STUDENT ACHIEVEMENT

AAA Achievement

The Missouri State Department of Elementary and Secondary Education (DESE) conducts an annual evaluation of school districts as a part of its ongoing classification and accreditation program. The objective of this program is to provide direction and assistance in the development of quality education in Missouri's public schools (KCMSD Exh. K-69). Under this program Missouri's school districts are classified according to the quality and quantity of the educational programs and services they offer, including such items as teacher qualifications, class size, instructional equipment, library resources, and instructional materials. The highest classification is "AAA." A AAA rating is a designation which communicates to the public that a school system quantitatively and qualitatively has the resources necessary to provide minimum basic education to its students (Dr. Eubanks' testimony at 22,360).

Presently KCMSD is rated AA and has been so rated since 1977. All other school districts in the Kansas City area are rated AAA (testimony of Dr. Larry Keisker). KCMSD's eligibility for AAA rating is dependent upon improvement in library personnel and resources among KCMSD's elementary schools and secondary schools. Furthermore, the elementary school system is lacking in a minimum number of art, music, and physical education teachers. There is also a need for additional counselors at the elementary and secondary levels in order to reach AAA classification and finally, KCMSD elementary teachers do not have adequate planning time (KCMSD Exh. K-68).

Specifically, the following improvements must be made in order for KCMSD to meet or barely exceed AAA classification standards:

1. *Library Improvement.* KCMSD must hire 13 certified librarians for the elementary school libraries (KCMSD Exh. K-69, testimony of Dr. Eugene Eubanks at p. 22,363, testimony of Dr. Larry Keisker).

KCMSD needs an additional 9 senior high librarians (testimony of Dr. Keisker, KCMSD Exh. K-68, testimony of Dr. Eugene Eubanks at 22,362).

Additional media and library resources are needed at the elementary, junior and senior high school libraries. The total amount of additional resources needed to raise the library and media resources to a AAA standard is $950,000 (testimony of Dr. Larry Keisker, testimony of Dr. Eugene Eubanks at pp. 22,361-362, KCMSD Exh. K-68, State Plan at p. 97, KCMSD Exh. K-95 at p.6).

2. *Teaching Load and Curriculum.* The AAA standard for elementary teaching load is that "(a)ll teachers shall have planning time scheduled within the school day and shall devote no more than an average of 310 minutes of the six hour day to teaching except that full-time librarians and guidance counselors may devote 360 minutes of the six hour day to those duties." (*Handbook for Classification and Accreditation of Public School Districts in Missouri* at p. 18). Presently KCMSD is not in compliance with this minimum standard (testimony of Dr. Larry Keisker, testimony of Dr. Eugene Eubanks at pp. 22, 367-74, KCMSD Exh. K-68). Furthermore, the AAA standard for elementary school curriculum includes a requirement that art and music shall be scheduled and taught at least 60 minutes per week by teachers with the proper subject matter certification or teachers with regular elementary certificates who are supervised by teachers with proper subject matter certification and that physical education shall be scheduled and taught at least two 30 minute periods per week by teachers with certificates in physical education or by teachers with regular elementary certificates who are supervised by teachers with certificates in physical education. (*Handbook for Classification and Accreditation of Public School Districts in Missouri* at p. 20). KCMSD is presently not in compliance with this AAA standard (KCMSD Exh. K-68, testimony of Dr. Eugene Eubanks at pp. 22, 367-68, testimony of Dr. Larry Keisker).

Both the State and KCMSD propose using additional art/PE/music specialty teachers on the elementary level in order to obtain additional planning periods for existing elementary teachers. Presently KCMSD has 48 specialty curriculum teachers with each student receiving 1 art/PE/music session every ten days. There are 20,245 elementary students in KCMSD (KCMSD Exh. K-74). In order to meet the AAA curriculum standards for these three specialty areas, 34 teachers are needed in each of the three areas. Thus there is a need for 102 teachers. Since KCMSD presently employs 48 of these teachers, then a total of 54 additional art/PE/music teachers are needed in order to comply with AAA teaching load standards at the elementary level (testimony of Dr. Eugene Eubanks at p. 22, 368-9).

The hiring of 54 additional specialty curriculum teachers would also provide 180 minutes per week of planning time for elementary school teachers. Seventy minutes of planning time per week would still be needed by elementary school teachers in order to reach AAA standards (*Handbook* at p. 18). The State recommends that this additional time could be achieved through shared recess supervision loads. That is, since there are two 15 minute recess periods each day, there is a total of 150 minutes of recess time each week. If two teachers would trade off responsibilities for supervising these recess periods, then each teacher would be given an additional 75 minutes per week of planning time, enough to meet AAA standards when combined with the

180 minutes of planning time provided by the art/PE/music teachers (testimony of Dr. Keisker).

The KCMSD proposes to hire 62 additional teachers in order to fill the planning time remaining.

In order to meet the AAA classification requirements for teaching load at the elementary school level, KCMSD shall hire an additional 31 certified teachers and 31 teacher's aides in order to insure that all teachers have planning time scheduled within the school day and that all teachers should devote no more than an average of 310 minutes of the six hour day to teaching.

3. *Counselors*. The AAA standard for elementary counselors is 1 counselor for every 1,500 students, plus for every major fraction above the 1,500 student level, an additional half-time counselor (*Handbook* at p. 19). Presently KCMSD has no elementary counselors (testimony of Dr. Eugene Eubanks, p. 22,366). Fourteen additional counselors are needed in order to meet AAA standards.

At the secondary level AAA standards require one full-time counselor for every 390 students (*Handbook* at pp. 27, 33). The KCMSD needs an additional four counselors to meet AAA standards (testimony of Dr. Keisker).

The patrons of a school district, especially the parents of potential students of that school district, view a AAA rating as an important factor in measuring the school's ability to educate its students. Achieving AAA classification could be the first step in KCMSD's journey to regain and maintain a quality education program and could serve to assist in attracting and maintaining non-minority student enrollment. Achieving AAA status has been recognized by the Eighth Circuit as a proper component of a desegregation plan. *Liddell v. State of Missouri* (*Liddell VII*), 731 F.2d 1294, 1318, *cert. denied*, 469 U.S. 816, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984), *Liddell v. State of Missouri*, (*Liddell VIII*),

758 F.2d 290, 294 (1985). Therefore, KCMSD shall hire 13 certified librarians for its elementary school libraries, 9 certified librarians for the senior high school libraries, and purchase $950,000 in additional media and library resources at the elementary, junior and senior high library levels. Furthermore, KCMSD shall hire 18 art certified elementary school teachers, 18 music certified elementary school teachers, and 18 physical education certified elementary school teachers for the purpose of achieving AAA standards in the area of elementary curriculum and assisting in reaching AAA standards in the area of teaching loads. KCMSD shall also hire 31 additional certified elementary school teachers and 31 teacher's aides who shall be used to free up planning time for existing elementary school teachers in order to insure that all teachers have planning time scheduled within the school day and that all teachers should devote no more than an average of 310 minutes of the six hour day to teaching. KCMSD shall hire 14 additional elementary school counselors for every 1,500 students presently enrolled at KCMSD elementary level. KCMSD shall hire an additional four certified counselors at the secondary level. All additional hirings and additional resources purchased under this order which shall enable KCMSD to reach. AAA classification status shall be done before and during the 1985/86 school year in order that the new classification ratings issued by the State in the spring of 1986 will reflect the results of this effort. The maximum funds available for achieving AAA status shall be $4,738,500. No more than $950,000 shall be spent on additional library and media resources. The maximum cost for individual librarians, counselors and teachers, including fringe benefits, shall be $28,000. The maximum cost for individual teacher's aides, including fringe benefits, shall be $9,500. The cost for achieving AAA status, in the maximum amount of $4,738,500, shall be borne equally by the KCMSD and the State of Missouri.

Reducing Elementary and Secondary School Class Size

The Missouri State Board of Education in 1984 stated that "[t]oday, in many schools, the entire educational process is bogged down because so many students have not mastered requisite skills thoroughly and because teachers must spend so much time helping them "catch up." Until we elevate the "floor of achievement" for all students — *at least in terms of basic school skills* — the slowest learners will continue to dictate the pace and content of instruction for all the rest." *Reaching for Excellence* at p. 18 (KCMSD's Exh. K-75). That education process has been further "bogged down" in the KCMSD by a history of segregated education. Too often, as a result, a higher percentage of black students are among the lower achievers. The cost of this under-education is enormous.

> When thousands of our citizens are afforded only inferior educational opportunities, they suffer a loss which can never be compensated and the whole country is subjected to unnecessary social and economic waste.

Robert F. Kennedy, *The Pursuit of Justice,* p. 73 (1964). The Missouri State Board of Education has made a number of recommendations to improve educational opportunities for all Missouri students, including " [i]ncreasing the individual attention and instruction available to students by providing funds to enable school districts to maintain classes no larger than 15 students in kindergarten to grade 3 and no larger than 20 students in basic skill classes in grades 4 through 6." *Reaching For Excellence, supra,* at 21. All of the hearing testimony by experts, board members, and patrons, supports the conclusion that increasing individual attention and instruction will result in giving teachers more manageable teaching loads. Further, if the more manageable teaching loads are accompanied by changes in curriculum materials and methods and adequate staff development, then significant gains in student achievement should result

(testimony of Dr. Daniel Levine at pp. 22,333-35, testimony of Dr. Eugene Eubanks at 22,379, 22,400-02, 22,494-505, testimony of Dr. Herb Walberg, testimony of Joan Abrams, testimony of Dr. Gene Glass, testimony of William Alexander, testimony of Marie Toffey, testimony of Dr. Willis D. Hawley). Reduced class size also serves to increase the likelihood that the KCMSD could maintain and attract non-minority enrollment in the future (testimony of Sue Fulson, testimony of Katherine Rush Thompson). Finally, reduced class size will assist the KCMSD in implementing the quality education components contained in this plan.

Therefore, it is this Court's finding that achieving reduced class size is an essential part of any plan to remedy the vestiges of segregation in the KCMSD. Reducing class size will serve to remedy the vestiges of past segregation by increasing individual attention and instruction, as well as increasing the potential for desegregative educational experiences for KCMSD students by maintaining and attracting non-minority enrollment.

There are 3,081 students in kindergarten sessions with some duplicates due to the all day kindergarten program. There are 100 kindergarten teachers, (a figure which should be multiplied times two in order to account for the morning and afternoon session) (State's Exh. 55). The average student-teacher ratio is 18.9 to 1. There are 41 sessions of Chapter I all day kindergarten, each with 15 students, equaling 1,615 students total. Subtracting those students and teachers, a student-teacher ratio average of 19.9 to 1 is reached. There are 1,413 students in kindergarten classes that have more than 22 students for every teacher, the goal established by the KCMSD. Thus, KCMSD must have 64.23 teachers in order to reach the KCMSD reduced class size goal in kindergarten. Since KCMSD presently has 53 teachers, it means an additional 12 teachers are needed at the kindergarten level to reach the KCMSD's reasonable goal of no more than 22 students in kindergarten classes.

There are 8,603 students taught by 388 1/2 teachers in grades 1 through 3 resulting in a student-teacher ratio of 22.14 to 1 (KCMSD Exh. K-56). Of those students 1,369 are in 58 Chapter 1 special classes. Subtracting the Chapter 1 students and teachers from the total number of students and teachers, there are 7,234 students and 272 1/2 teachers, equaling a 26.55 to 1 student-teacher ratio average in grades 1 through 3 (KCMSD Exh. K-56). Of the 50 elementary schools in KCMSD, 22 of these schools have an average student-teacher ratio above the 22 to 1 goal (44%). Furthermore, 240 of the 338 elementary school classrooms have student-teacher ratios in excess of the 22 to 1 student ratio goal (71%) (KCMSD Exh. K-56, testimony of Dr. Eugene Eubanks). Thus, in order for the 7,234 elementary students in grades 1 through 3 who are not in special Chapter 1 classes, to have a reduced class size of 22 students, there is a need for 328.8 teachers. Presently, KCMSD has 272.5 teachers in grades 1 through 3 (KCMSD Exh. K-56), testimony of Dr. Eugene Eubanks). In order to achieve the goal of having no more than 22 students in any classroom in grades 1 through 3, KCMSD will need an additional 56 teachers.

In grades 4 through 6 there are 6,625 students who are taught by 274.5 teachers, equaling an average of 24.1 to 1 student-teacher ratio (KCMSD Exh. K-57). 875 of those students are in 33 special two-teacher classes (K-57). When those students and teachers who are in special classes are subtracted from the totals, there are 5,750 students being taught by 208.5 teachers in grades 4 through 6, yielding a student-teacher ratio of 27.6 to 1. There are 3,102 students in grades 4 through 6 who are presently in classes that exceed the 27 to 1 reasonable student-teacher ratio goal established by KCMSD (K-57). Thus in order to reduce all classes to the 27 to 1 goal established by KCMSD, the district will need 115 teachers. Presently they have 100 teachers teaching those 3,102 students. Therefore, KCMSD needs an additional 15 teachers in order to reduce class size.

There are 5,351 students in the junior high schools of KCMSD. There are 243 teachers at the junior high level. This yields a student-teacher ratio average of 22.02 to 1 (KCMSD Exh. K-58). There are 37,457 student classes at the junior high level. This figure relates to the 1,376 teacher assignments which exist at the junior high level. This means that the student-teacher ratio is 27.2 to 1. However, the more meaningful figure relates to the number of student classes and the number of teachers available. Presently, during an average school day a teacher will have classes in which a total of 154 students are present. There are nine junior highs in KCMSD and in seven of those junior high schools the average teacher has more than 125 students during the day. KCMSD will need an additional 22 junior high teachers in order that no teacher will have more than 125 students total in all classes per day.

There are 8,727 students at the senior high level and 352 teachers. (KCMSD Exh. K-59). This means that the average class size is 24.8 to 1. There are 52,362 student classes and 1,824 teaching assignments which yields a student-teacher ratio of 28.7 to 1. However, the more revealing figure is that there are 52,362 student classes, when divided by the 352 teachers it shows that each teacher, on the average, has 148.76 students each day enrolled in classes they teach during that day (K-59). Furthermore, 8 of the 9 (89%) senior high schools have ratios which are in excess of the 125 student per day goal established by KCMSD. In order to reach that goal KCMSD needs an additional 78 senior high teachers.

Thus, in order to reach the reasonable class size goals established by the KCMSD of no more than 22 students in grades kindergarten through third grade, no more than 27 students in grades four through six and on the secondary level, no more than 125 students per teacher per day, a total of 183 additional teachers will need to be hired. Therefore, it is ordered that beginning with the school year 1987/88 there will be no kinder-

garten, first, second, or third grade classes in the KCMSD with more than 22 students. Further, it is ordered that by the school year 1987/88 there will be no more than 27 students in any classroom in grades four through six in the KCMSD. In addition, it is ordered that by the school year 1987/88 no secondary education teacher in the KCMSD, with the exception of physical education and music teachers, shall be required to teach more than 125 students per day.

Costs for reaching this goal shall be paid for by the State of Missouri. The total costs shall not exceed $12,000,000, with no more than $2,000,000 the first year, $4,000,000 the second year and $6,000,000 the third year. While every effort should be made by the KCMSD to reach these minimal goals as quickly as possible, the goals should not be reached at the expense of hiring less than fully qualified and well trained teachers.

The goals established by this Court are only minimal goals. As the State of Missouri has noted in its pamphlet, *Reaching for Excellence* (KCMSD Exh. K-75), the ideal goal would be to have kindergarten through third grade classes no larger than 15 students and grades four through six with no more than twenty students. The patrons, parents, administration and board of directors of the KCMSD are encouraged by this Court to take whatever actions are necessary to reach for excellence and reduce class size even further than the goals established by this Court. While the funds allocated by this Court for the purpose of reducing class size will provide significant assistance, the financial responsibility for reaching beyond these minimal goals and reaching toward educational excellence must be borne by the patrons of the KCMSD.

Summer School

Both the State of Missouri and the KCMSD propose the implementation of a summer school program as a part of a desegregation plan. The KCMSD Plan (p. 34-35) for summer

school has three basic goals. First, it seeks to provide remedial and developmental learning experiences for elementary and secondary education level students. Next, it seeks to provide reinforcement and enrichment for secondary education students and finally, it seeks to provide a desegregative learning experience at both elementary and secondary levels. The State Plan (p. 88) is strictly a remedial plan in which the KCMSD would continue to operate the elementary summer school program and, in addition, would implement summer school in one junior high and one senior high at a facility which would insure the highest maximum racial mix.

Additional learning time is a key component of any effort to improve the quality of education in a public school system (testimony of Herbert Walberg). Summer school expands the amount of learning time available. Therefore, as a part of an overall effort to improve the academic achievement of students within KCMSD, both as a remedial measure and to maintain and attract non-minority enrollment, a well planned and carefully implemented summer school program at the elementary and secondary levels can be an important component in an overall desegregation plan. In addition, summer school can serve as a means to increase the opportunities for desegregative learning experiences. In the past the KCMSD has operated successful summer school learning experiences in which non-minority enrollment from surrounding school districts, participating with minority enrollment from the KCMSD, were involved (testimony of Dr. Daniel Levine at p. 22,203).

The KCMSD is therefore ordered to conduct a summer school program, beginning in the summer of 1985, for elementary level students who would otherwise have been retained in their present elementary grade, at a cost not to exceed $300 per student, with a maximum total cost of $445,000. KCMSD shall also implement a summer school program at the junior high school level in the summer of 1985, at a cost not to exceed $250 per student with

the total cost not to exceed $301,000. This summer school program shall be expanded to include senior high school students and enrichment and cooperative programs in the summer of 1986 with those items being budgeted at $63,000 for senior high summer school programs and $100,000 for the enrichment and cooperation program. These three programs shall involve at least 1,000 different senior high school students. Costs shall be divided equally between the State of Missouri and the KCMSD.

Full Day Kindergarten

Both the State Plan (State Plan at p. 85) and the KCMSD Plan (KCMSD Plan at p. 18) propose a full day kindergarten program. All day kindergartens are presently serving 1,229 KCMSD students in 61 classes (testimony of Dr. Eugene Eubanks at p. 22,441, KCMSD Exh. K-55). The goal under the KCMSD Plan is to provide all day kindergarten throughout the district for all willing to participate. The State Plan would implement all day kindergarten in elementary schools which presently have it but do not serve all students, expand it to all students not presently served in 7 primarily black elementary schools, and further expand it to 8 elementary schools but only for those children who rate at or below the 45th percentile in certain areas of the Missouri Kindergarten Inventory of Development Skills (KIDS).

Present experience in KCMSD with the full day kindergarten shows that such a program cannot only provide remediation to those who are victims of past segregation, but will also assist the school district in maintaining and attracting desegregated enrollment and providing integrative experiences at an early age (testimony of Dr. Eugene Eubanks at p. 22,443, testimony of Dr. Daniel Levine at pp. 22,179-181).

As a part of this desegregation plan all day kindergarten shall be offered to all students. In order to implement this program, a program which has been approved by the Eighth Circuit in the St. Louis desegregation case, *Liddell VII*, 731 F.2d at 1317, the

district is ordered to hire for the 1985/86 school year up to a total of 39 additional certified kindergarten teachers at a maximum individual cost, including fringe benefits, of no more than $28,000 annually, for a total cost of not more than $1,092,000. Costs shall be borne equally by the State of Missouri and the KCMSD.

Before and After School Tutoring

Both the State Plan (p. 107) and the KCMSD Plan (pp. 17 and 22) propose the implementation of elementary after school tutoring programs of roughly $104,400. While the State and KCMSD agree on the approximate cost of such a program, the parties disagree over the components which make up such a program.

The State indicates that such a program should be implemented in up to a maximum of 20 of the elementary schools where the enrollment remains 90% or more black after any student reassignment is conducted. The State further limits this program to after school and incorporates into it cross-age instruction or peer tutoring, parental instruction, participation by community volunteers, specialized instruction by KCMSD teachers and enrichment programs that will supplement and build upon regular day programs.

The KCMSD program proposes before and after school tutoring for kindergarten through sixth grade, implemented in any elementary school in the district where there is sufficient number of students to warrant such a program (KCMSD Plan pp. 17 and 22).

Similar programs have been found to be a way to not only remedy the vestiges of past segregation but also a means to attract and retain enrollment from non-minority families where both parents work (testimony of Dr. Daniel Levine at pp. 22-163). Further, cross-age instruction or peer tutoring and parental

the total cost not to exceed $301,000. This summer school program shall be expanded to include senior high school students and enrichment and cooperative programs in the summer of 1986 with those items being budgeted at $63,000 for senior high summer school programs and $100,000 for the enrichment and cooperation program. These three programs shall involve at least 1,000 different senior high school students. Costs shall be divided equally between the State of Missouri and the KCMSD.

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district is ordered to hire for the 1985/86 school year up to a total of 39 additional certified kindergarten teachers at a maximum individual cost, including fringe benefits, of no more than $28,000 annually, for a total cost of not more than $1,092,000. Costs shall be borne equally by the State of Missouri and the KCMSD.

Before and After School Tutoring

Both the State Plan (p. 107) and the KCMSD Plan (pp. 17 and 22) propose the implementation of elementary after school tutoring programs of roughly $104,400. While the State and KCMSD agree on the approximate cost of such a program, the parties disagree over the components which make up such a program.

The State indicates that such a program should be implemented in up to a maximum of 20 of the elementary schools where the enrollment remains 90% or more black after any student reassignment is conducted. The State further limits this program to after school and incorporates into it cross-age instruction or peer tutoring, parental instruction, participation by community volunteers, specialized instruction by KCMSD teachers and enrichment programs that will supplement and build upon regular day programs.

The KCMSD program proposes before and after school tutoring for kindergarten through sixth grade, implemented in any elementary school in the district where there is sufficient number of students to warrant such a program (KCMSD Plan pp. 17 and 22).

Similar programs have been found to be a way to not only remedy the vestiges of past segregation but also a means to attract and retain enrollment from non-minority families where both parents work (testimony of Dr. Daniel Levine at pp. 22-163). Further, cross-age instruction or peer tutoring and parental

involvement in the education process are elements which have been successful in other school districts when used to improve academic achievement (testimony of Dr. Gene Glass, testimony of Dr. Willis D. Hawley). Therefore, KCMSD shall implement a before and after school tutoring program in at least ten schools where participation is of a sufficient level to operate the program efficiently, economically and effectively. This program should be operated in grades kindergarten through six and should utilize cross-age instruction, parental instruction, and community volunteers under the overall supervision of certified teachers. Costs for this program shall not exceed $104,400. A proposed budget shall be filed by the KCMSD no later than August 15, 1985. Costs shall be borne equally by the State of Missouri and the KCMSD.

Early Childhood Development Programs

Both the State Plan (p. 44-83) and the KCMSD Intra-district Plan (p. 17) propose early childhood development programs. The KCMSD's proposal lacks any degree of specificity as to what services will actually be delivered. The State's proposal is very specific in terms of the services to be delivered, and the steps to be taken in implementing each part of the early childhood development program (testimony of Dr. Daniel Levine at pp. 22,167-68).

The State's proposal refers to but does not *specifically* incorporate an early language development component. An early language development program is a "keystone to eventual successful academic achievement." (testimony of Dr. Eugene Eubanks at p. 22,419). Early language development programs have been shown to be extremely successful in Los Angeles and San Diego, California in assuring that a student will be able to make the most of the educational opportunities offered in public schools (testimony of Dr. Daniel Levine at p. 22,169-70, Dr. Eugene Eubanks at 22,419).

The State Plan provides a carefully defined and comprehensive program. Therefore, the State of Missouri's program will be implemented as a part of this desegregation plan. Officials from the State of Missouri and from the KCMSD *shall cooperate* to implement the basic components of the State Plan with modifications of the State Plan in order to insure that it includes an early childhood language development program and that the State Plan realistically reflects the time constraints and realities of implementing such a program within the KCMSD. Total budget shall not exceed $1,223,348. Costs shall be borne equally by the State of Missouri and the KCMSD.

Effective Schools

To be effective, changes in the KCMSD aimed at improving student achievement must be planned and implemented at the school level (testimony of Dr. Daniel Levine, Dr. Eugene Eubanks, Sue Fulson, Herbert Walberg, Dr. Joan Abrams, Carla Santorno, Dr. Willis D. Hawley). In fact, if a district and its personnel lack a strong commitment to a program, then the likely result is that the program, if it is implemented at all, will be implemented ineffectively. *See, e.g.*, Vol. VIII P. Berman and M. McLaughlin, *Federal Program Supporting Educational Change, Factors Affecting Implementation and Continuation*, 12-21, 30-31 (1977). Thus, effective change in schools comes from the "bottom up" and not from the "top down." Real educational change takes place only after school administrators and staff, and patrons and parents, have been involved in the planning process and are committed to achieving this change. *See, e.g.*, Fullan and Pomfret, *Research on Curriculum and Instructional Implementation*, 47 Rev.Educ. Research 335, 391 (1977). The effective school project on the elementary level and the reform and reorganization demonstration project on the secondary level, proposals of the KCMSD, serve as clear examples of the growing awareness that public educational institutions are a dynamic system and it is only with the input and commitment of the many groups who

have interest and influence in our schools—school board, administration, principal, teacher, parent, patron, and student—that effective change is realized. *See, e.g., Oliver v. Donovan*, 293 F.Supp. 958 (E.D.N.Y.1968) (where the teachers' union resisted the educational components of a desegregation plan because they felt the nature of the components threatened the teachers' vested interests in traditional policies).

Therefore, since the effectiveness of any program which seeks to improve student achievement is directly related to the degree of involvement of patrons, parents, teachers and administrators at the local school level and since the measure of any desegregation plan is its effectiveness, *Davis v. Board of School Commissioners*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1291, 28 L.Ed.2d 577 (1971), rather than the Court ordering that any additional *specific* program components designed to improve academic achievement be implemented, the KCMSD shall make a determination as to the specific programs to be added. The State of Missouri shall fund such programs aimed at increasing student achievement in the following amounts:

1. For each of the 25 schools with enrollments of 90% or more black:
   a. 1985/86 school year $75,000 each school
   b. 1986/87 school year $100,000 each school
   c. 1987/88 school year $125,000 each school
2. For each of the remaining 43 schools;
   a. 1985/86 school year $50,000 each school
   b. 1986/87 school year $75,000 each school
   c. 1987/88 school year $100,000 each school.

The first year these funds shall be spent on components contained in the intradistrict plan submitted by the KCMSD in

response to this Court's January 25, 1985 order, such as mastery learning, elementary counselors and home school liaisons, transition rooms, pre-collegiate curriculum, alternative secondary school units and arrangements, occupational and career education, computer labs and computer assisted and managed instruction. Decisions on how the first year funds shall be spent will be made by the KCMSD school board of directors. However, in subsequent years the decisions will be based upon a plan developed by the existing school advisory committees. These committees, made up of parents, teachers and the principal at each school (testimony of Sue Fulson), shall make recommendations to the Board of Education in regard to how these funds should be spent at the school which they represent. The Board of Education shall review and take action as to the appropriateness of these expenditures and ways in which costs can be reduced by integrating common efforts among the schools. Criteria governing these funds are as follows:

1. These funds may only be spent to expand or implement educational improvement components presently contained in the intradistrict plan submitted by the KCMSD in response to this Court's order of January 25, 1985; and

2. The programs upon which these funds may be spent must be for the sole purpose of improving student achievement as measured by the Iowa Test of Basic Skills and the Basic Essential Skills Test (BEST).

In this way the responsibility for determining what educational efforts are best suited to individual schools will be in the hands of those individuals with the knowledge, expertise and information necessary to make the best judgments. By October 15, 1985, in a cooperative effort between the KCMSD and the desegregation plan Monitoring Committee established by this Court, specific student achievement goals will be established. These goals should be similar to, but more specific than, those expressed in rebuttal testimony by Dr. Daniel Levine (reaching

national norms on the elementary level in the area of reading in four years and improving the passing rate on the BEST test on the secondary level to a 95% pass rate). These accountability standards should include a time line showing how the KCMSD will progressively move toward achievement of the overall goals. Continued funding, both overall and of specific programs, will depend upon the school's successful efforts at making reasonable progress toward achieving the overall goals, as well as the incremental steps toward those goals.

Improvement in student achievement to remedy the ills of segregation will take disciplined efforts. It will require schools with genuinely high standards and expectations, parents who support and encourage their children to fulfill their potential, and a school district in which teachers are considered valuable professionals. With these resources, and the commitment of the district, improvement can and will be made.

Magnet Schools

Magnet schools can be utilized to assist the State of Missouri and the KCMSD in expanding desegregative educational experiences for its students (testimony of Dr. Daniel Levine at pp. 22,214, testimony of Dr. Eugene Eubanks at 22,445, testimony of Dr. Gary Orfield, testimony of Dr. Willis Hawley). However, to be a valuable and effective technique for increasing student desegregation, the themes for the magnet schools must be carefully chosen and based upon a survey of the target enrollment population. There must also be extensive planning concerning the implementation of the magnet programs (testimony of Dr. Susan Uchitelle, and Dr. Gary Orfield).

KCMSD currently operates one magnet secondary school (Lincoln Academy) and two magnet elementary complexes (Southwest Cluster and Swinney-Volker). Reduced levels of federal funding under the Emergency School Aid Act (ESAA) has meant that the KCMSD has not been able to provide the level

of funding which these magnet schools originally received, and as such, these programs have not realized their full potential in drawing non-minority enrollment (testimony of Paul Holmes, KCMSD Exh. K-79).

Therefore, the KCMSD is ordered to submit a budget by October 15, 1985, to the Monitoring Committee for the existing magnet schools of Lincoln, Swinney-Volker and Southwest Cluster. This budget shall be both comprehensive and detailed and shall be limited to budget items which are directly related to enhancing the full desegregative drawing power of these schools. Furthermore, KCMSD shall conduct extensive surveys within the KCMSD and throughout the Kansas City, Missouri metropolitan area in order to determine what magnet themes appear to be most likely to attract non-minority enrollment. This survey shall be completed by January 15, 1986, and a report filed with the Monitoring Committee, accompanied by a proposed marketing and recruitment plan. The marketing and recruitment plan shall include a budget. The State of Missouri shall pay for all costs in conducting the area wide survey and presentation of the report ordered by KCMSD, with such costs not to exceed $60,000. The KCMSD shall also submit to the Committee on or before April 15, 1986, its plan for implementation of additional magnet programs within KCMSD, including a detailed budget. Total costs for preparation of this report shall not exceed $25,000 and shall be paid for by the State of Missouri.

Staff Development

Staff development is an essential element in any attempt to improve student achievement as a part of a desegregation plan (testimony of Willis D. Hawley). The KCMSD Plan calls for extensive staff development (KCMSD Plan p. 36-38). The District's Plan would provide training to administrative personnel and teachers on the principles and goals of a desegregation plan, the implementation of effective instructional programs, effective methods for transmitting information to parents and

community about desegregation, methods of enforcing a fair, equitable discipline program in a desegregated setting, and methods of dealing with transportation problems as well as familiarity with available community and school resources and a knowledge of applicable federal and state laws. Most of the training described in the KCMSD Plan is aimed at assisting in the desegregation of KCMSD and not aimed directly at the quality education components of this plan.

The State Plan incorporates staff development as a part of the individual components, such as the instructional management system component. It relies upon a train-the-trainer approach in which selected key personnel in each school would be provided extra training and those individuals would go back to that school and provide training to the remaining teachers.

KCMSD is ordered to establish a staff development program. This program will be developed in conjunction with the public relations programs to be implemented by the District. The desegregation public relations program, which is aimed at informing and soliciting the support of community members, shall use the KCMSD staff in spreading the word throughout the community about the desegregation plan.

In addition, following decisions made by the school advisory committees and the school board as to the expenditures of funds in the effort to improve student achievement throughout the district, specific training needs of the individual teachers and principals shall be determined and a staff development program planned and implemented. Stipends for after school, weekend and summer staff development sessions, shall be available only when it is impossible to conduct the training and development within the normal work schedule. A fund of $500,000 shall be provided to the KCMSD by the State of Missouri for the payment of stipends.

Mandatory Student Reassignment

In 1977 the KCMSD implemented a desegregation plan developed by approximately 65 community members chosen to represent parents, students, teachers and various Kansas City groups and organizations (testimony of Sue Fulson). A number of alternative proposals were submitted to the KCMSD School Board and the version eventually approved was designated "6C" (testimony of Dr. Paul Holmes, Sue Fulson). The goal of Plan 6C was to have a minimum of 30% minority enrollment, with the exception of kindergarten classes, in every KCMSD school. Prior to implementation of this plan the enrollment in KCMSD was 65.6% minority students. Twenty of the district's schools were from 30 to 80% minority, 25 were less than 30% minority, and 41 were more than 80% minority (KCMSD Exh. K-2). Following the implementation of Plan 6C, boundary lines were changed, elementary schools were paired and clustered, enlarged secondary attendance zones were created, allowing two-way reassignment of students, noncontiguous zoning was implemented, and as a result, more than 16,000 KCMSD students had their school assignments changed (testimony of Dr. Paul Holmes, KCMSD Exh. K-70-74, 76). Following Plan 6C implementation, no KCMSD school enrolled less than 30% minority students in grades 1 through 12. Enrollment since that time has decreased by almost 30%, while white enrollment has decreased by more than 44% (KCMSD Exh. K-2). In 1979-80 the United States Office of Civil Rights classified KCMSD as being "in compliance" with federal requirements for school desegregation under Title VI of the Civil Rights Act of 1964 (testimony of Ward). The 1984-85 assignment patterns are the same assignment patterns which were approved by the Office of Civil Rights in 1978 except for adjustments made due to school closings (testimony of Paul Holmes). The KCMSD enrollment for 1984/85 was 36,259 total students with 68.3% of them being Black, 26.7% being non-minority, 3.7% Hispanic, and 1.3% other minority groups (KCMSD Exh. K-74).

The KCMSD proposes to continue the existing student assignment plan, with appropriate modifications for any school closings (KCMSD Plan pp. 2-5). This proposal would require that any modifications for school closings be conducted so that the highest level of desegregation feasible will be achieved and so that each school in the KCMSD will achieve an enrollment of no less than 30% minority for grades 1 through 12. Furthermore, KCMSD's plan would continue to restrict transfers which inhibit desegregation and permit voluntary transfers of students from schools in which they are in the racial majority to a school in which they would be in the racial minority (KCMSD Plan p. 6).

The State Plan proposes to "reduce the percentage of black students in schools where they represent a disproportionate share of the students (compared to the enrollment of the District as a whole). . . ." (State Plan pp. 9-13). The State estimates that in order to achieve this goal and obtain an enrollment more proportionate to the district's percentages as a whole, approximately 4,270 students would need to be transferred at a cost in excess of $5,000,000. Initially, however, the State proposes to conduct computer simulations in order to determine the feasibility of additional transfers to achieve a more proportionate enrollment in each school in the district (testimony of Dr. Terry Stewart). In conducting this study the State proposes to take into account all practical limits on actually achieving greater intradistrict racial integration. These limits include the importance of a student attending a school as near his home as possible, the important role that parent and student choice can play in making any reassignment plan work, and any other potential barrier to an effective reassignment plan (testimony of Dr. Terry Stewart, State Plan at p. 9).

Nineteen of the 50 elementary schools in the KCMSD presently have an enrollment of 90% or more black students. The enrollment in three of the eight junior high schools in the KCMSD is presently 90% or more black. Three of the eight

senior high schools have enrollments which are 90% or more black (excluding Lincoln Academy South and North). (KCMSD Exh. K-74).

The KCMSD and the plaintiffs oppose any further mandatory student reassignment at this time. KCMSD's witnesses expressed the opinion that generally mandatory student reassignment would result in further white withdrawal from the school district and specifically that, if the State's plan was implemented, it could result in moving more blacks into racial isolation (testimony of Dr. Daniel Levine at 22,224, testimony of Dr. Eugene Eubanks at 22,447, testimony of Dr. Paul Holmes). In regard to the State plan, Dr. Holmes testified that if racial isolation is defined as a school with 50% or more minority, then in attempting to achieve student body ratios in each school which are proportionate to the district wide ratios, the State's Plan could result in moving a black student from a less racially isolated environment to one which is much more racially isolated. In addition to Dr. Eubanks and Dr. Levine, there was extensive testimony provided by other witnesses that implementation of any further mandatory student reassignment would result in what is known as "white flight." (the withdrawal of white student enrollment to private schools or the exodus of white families to the suburbs). (testimony of Sue Fulson, testimony of Dr. Gary Orfield, testimony of Dr. Willis D. Hawley).

White flight is no excuse for school officials to avoid the implementation of a reasonable desegregation plan. *Monroe v. Board of Commissioners,* 391 U.S. 450, 459, 88 S.Ct. 1700, 1704, 20 L.Ed.2d 733 (1968). Further, concern over white flight cannot justify any decision to do less than what is necessary to secure the constitutional rights of the students of the KCMSD. *Wright v. Council of the City of Emporia,* 407 U.S. 451, 456-57, 92 S.Ct. 2196, 2200-01, 33 L.Ed.2d 51 (1972). Therefore, while white flight may be "cause for deep concern," it cannot be accepted for achieving anything less than the "complete uproot-

ing of the dual public school system." *United States v. Scotland Neck City Board of Education*, 407 U.S. 484, 491, 92 S.Ct. 2214, 2218, 33 L.Ed.2d 75 (1972).

However, "[t]he constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole." *Swann v. Charlotte Mecklenburg Board of Education*, 402 U.S. at 24, 91 S.Ct. at 1280. Nor is the existence of a small number of one-race or virtually one-race schools within a school district "in and of itself the mark of a system that still practices segregation." *Id.* at 26, 91 S.Ct. at 1281. "The criterion for determining the validity of provisions in a desegregation plan is whether they are reasonably related to the ultimate objective." *Tasby v. Wright*, 713 F.2d 90, 97 (5th Cir.1983). Therefore, "[w]hile the fear of white flight cannot be accepted as a reason for not acting [citations omitted] the Court may elect a constitutionally permissible plan calculated to minimize white boycotts." *Id.* at 99. That is why the concern over white flight may be taken into account "when it is not advanced to thwart mandatory desegregation (or to perpetuate segregation), but rather to promote a wider integration." *Parent Association of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 720 (2d Cir.1979). In fact, situations in which the United States Supreme Court has rejected use of white flight as a factor in determining or limiting a desegregation remedy were all cases in which a school board had invoked white flight in order to avoid real integration. *Monroe v. Board of Commissioners, supra* 391 U.S. at 450, 88 S.Ct. at 1700; *Wright v. Council of the City of Emporia, supra* 407 U.S. at 451, 92 S.Ct. at 2196; *United States v. Scotland Neck City Board of Education, supra* 407 U.S. at 484, 92 S.Ct. at 2214. Thus, while the concern over white flight cannot be accepted as a reason for achieving anything less than the "complete uprooting of the dual public school system," *United States v. Scotland Neck City Board of Education, supra* at 491, 92 S.Ct. at 2218, the failure to include remedial measures to prevent such flight could

itself be a reason why a desegregation plan could achieve something less than "complete uprooting." *See*, Paul Gewirtz, *Remedies and Resistance*, 92 Yale Law Journal 585, 642 (1983). Recognizing the impact white flight can have on the effectiveness of a remedial plan is nothing more than recognizing that there is a difference between "catering to bias" and seeking to minimize patron resistance. *United States v. Board of Education*, 554 F.Supp. 912, 924-25 (N.D.Ill. 1983). This difference has been recognized by the Eighth Circuit in *Clark v. Board of Education*, 705 F.2d 265, 269-72 (8th Cir. 1983) (in order to prevent white flight and stabilize the integration process in a system that was 65% black a district court may reduce the black population in some integrated schools and thereby maintain a number of all black schools); and in *Adams v. United States*, 620 F.2d 1277, 1291-97 (8th Cir.) (to prevent white flight in a school system with 75% black enrollment, a desegregation plan need not reassign additional black children to schools with at least 30% black enrollment even though all-black schools remain), *cert. denied*, 449 U.S. 826, 101 S.Ct. 88, 66 L.Ed. 2d 29 (1980), *on remand sub nom., Liddell v. Board of Education*, 491 F.Supp. 351, 356 (E.D.Mo. 1980) (adopting plan), *aff'd* 667 F.2d 643 (8th Cir.), *cert. denied*, 454 U.S. 1081, 102 S.Ct. 656, 70 L.Ed.2d 629 (1981).

"Having once found a violation, the district judge or school authority should make every effort to achieve the greatest possible degree of desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Commissioners supra* 402 U.S. at 37, 91 S.Ct. at 1292. Therefore, it is incumbent upon this Court to further explore any reasonable potential for achieving further desegregation. As such, the State's proposal for further study, modified in its goal, must proceed. In proceeding the study should revise its goal. Instead of seeking to reassign students in order to achieve the same ratio of minority students to non-minority students in each school that exists in the enrollment of the district as a whole, the study should seek to

determine the feasibility of further reductions in the percentage of black students in the 25 schools where the enrollment remains 90% or more black, while recognizing the need for students to attend schools as close to home as possible. Total cost for this study should not exceed $175,000 and it shall be completed by the end of the 1985/86 school year. KCMSD's Plan 6C shall remain in full force and effect with any modification of the Plan being implemented only after review by the Monitoring Committee and approval by the Court.

The evidence is clear, further mandatory student reassignment at this time will only serve to increase the instability of the KCMSD and reduce the potential for desegregation. Unless and until this or other studies show that further mandatory student reassignment can achieve additional desegregation without destabilizing the desegregation which presently exists, then realization of further desegregation of the district must depend upon other components of this plan.

Volunteer Interdistrict Transfers

To accomplish desegregation within the boundary lines of a school district whose enrollment remains 68.3% black is a difficult task. As this Court stated in its January 25, 1985 order, "because of restrictions on this Court's remedial powers in restructuring the operations of local and state government entities," any *mandatory* plan which would go beyond the boundary lines of KCMSD goes far beyond the nature and extent of the constitutional violation this Court found existed. However, there are avenues available to the State of Missouri and the KCMSD which present the opportunity for increasing the desegregative educational experiences of the students within the Kansas City metropolitan area.

Achievement of AAA status, improvement of the quality of education being offered at the KCMSD schools, magnet schools, as well as other components of this desegregation plan can serve

to maintain and hopefully attract non-minority student enrollment. In addition, voluntary interdistrict transfers may serve to provide additional opportunities for desegregated schools as well as desegregative educational experiences for KCMSD students. Such plans have received encouragement from the Eighth Circuit in similar situations, *Liddell VII,* 731 F.2d 1294 (8th Cir.1984) (en banc), *cert. denied*, 469 U.S. 816, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984). In St. Louis voluntary interdistrict transfers have resulted in increased desegregation (testimony of Dr. Susan Uchitelle).

Therefore, the State of Missouri shall actively seek the cooperation of each school district in the Kansas City, Missouri metropolitan area in a voluntary interdistrict transfer program. On or before the end of the 1985/86 school year the State of Missouri shall report to the Monitoring Committee listing the suburban districts which have agreed to participate, stating how many students each district has agreed to accept as well as the number of students which would transfer to the KCMSD. KCMSD shall also report to the Monitoring Committee the number of its students which would transfer to a suburban district. If any of the suburban districts volunteer to participate in inter-district transfers, the program shall begin with the 1986/87 school year.

The State will be required to pay for the transportation and tuition costs of any KCMSD black student who wishes to transfer from a school within KCMSD in which their race is in the majority, (with preferences for students from schools with enrollments of 90% or more black students), to a school where space is available in another school district in the Kansas City metropolitan area in which their race is in the minority. In addition, the State shall pay for all transportation costs and the foundation allotment for non-minority students living in other school districts, who transfer to schools in the KCMSD, having a minority enrollment of 50% or more. Furthermore, the State shall continue to pay to the KCMSD the full student foundation

allotment for each student who transfers from the KCMSD to a suburban school district and to each suburban school district for each student who transfers from a suburban district to KCMSD. The receiving district will agree not to reject individual applicants unless there is a history of serious disciplinary problems, will allow the transfer student to remain in attendance until such student graduates or returns to the student's home district, as long as that student satisfies all academic and other standards applicable to all resident students, will treat interdistrict transfer students in the same manner, in all regards, as they treat resident students, and will permit KCMSD to recruit applicants for interdistrict transfers within its district. Any additional agreements between KCMSD and any participating metropolitan area school district shall be presented to the Monitoring Committee for review and action. Furthermore, the State of Missouri will be required to provide a full-time counselor for every 100 students who transfer from KCMSD to a Kansas City, Missouri area metropolitan school district. This counselor shall be in the employment of KCMSD and shall spend a proportionate amount of time at the suburban schools in which the KCMSD transfer students are enrolled.

Finally, upon submission of its report to the Monitoring Committee concerning the willingness of other school districts to participate in such a voluntary program, the State shall include an estimated budget for the potential transfers.

Capital Improvements

KCMSD is currently utilizing 50 elementary school buildings, 9 junior high buildings, and 9 senior high buildings (testimony of E. Allen Roth). The average age of the 68 school buildings utilized by the KCMSD is 58 years (testimony of E. Allen Roth).

The current condition of the 68 school facilities adversely affects the learning environment and serves to discourage parents who might otherwise enroll their children in the KCMSD (testimony of Dr. Levine, Dr. Eubanks, Sue Fulson, E. Allen Roth). The deterioration of the facilities is due to a deferred maintenance program which has extended over the past 10 to 15 years (testimony of E. Allen Roth). The deferred maintenance is a result of KCMSD's lack of financial resources as evidenced by its inability to pass a capital improvements bond issue, although several attempts have been made since 1965 (testimony of Carl Struby).

The deteriorating conditions of the facilities include safety and health hazards, educational environment impairments, functional impairments, and appearance impairments (testimony of E. Allen Roth, KCMSD Exhibit K-81, Devine James Study). The problems include extremes of heat and cold due to faulty heating systems, peeling paint, broken windows, odors resulting from inadequate and deteriorating ventilation systems, improper lighting, wiring problems, inadequate storage, lack of appropriate space for library and resource rooms, crumbling playground equipment installed over hard surfaces, water damage due to roof leakage, and deterioration of steps in school access areas (KCMSD Exhibit K-87, 67 slides of schools).

The improvement of school facilities is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of a good learning climate, such as heating deficiencies and leaking roofs, reduce the effectiveness of the quality education components contained in this plan.

During fiscal year 1985, under a Missouri statute permitting the organization of a not-for-profit corporation which would issue bonds for capital improvements to school buildings, the KCMSD raised $10,000,000 to permit correction of some of the

more extreme problems within the school building facilities presently being used. Under that statute KCMSD makes rental payments to the not-for-profit corporation, which has been granted title to these buildings, out of its operating budget in the amount of approximately $1,300,000 annually. These funds are utilized to pay the bond obligations (testimony of Carl Struby).

At the request of the KCMSD, E. Allen Roth, a licensed architect, examined 19 of the 68 school buildings and for four of the school buildings prepared a detailed cost estimate and specifications for correcting facility deficiencies. Based upon these visits, the 1980 Devine James study, and taking of bids for the partial work, Mr. Roth concluded that total costs for building rehabilitation in the KCMSD, to return the buildings to a point where they could be safe and appropriate for educational programs, would be between $55,000,000 and $70,000,000. Mr. Roth further estimated that the work could be completed within a three to four year time period (testimony of E. Allen Roth).

The State (State Plan p. 111) proposes a $20,000,000 facilities improvement program with the state making a one time contribution not to exceed $10,000,000. The purpose of this facility improvement program would be to promote and encourage the KCMSD to "strive for excellence in the care, maintenance, and upkeep of its facilities." (State Plan at p. 11). The State indicated that first priority should be given to those schools in which the student population was 90% or more black. These funds would be to correct safety hazards at the most severe level of inadequacies. The State argues against the adoption of a more comprehensive facility improvement program as a part of the desegregation plan for four reasons. First, the present condition of the facilities, according to the State, is not traceable to the unlawful segregation found to have existed by this Court. Second, the present condition of facilities is due to the lack of maintenance on the part of the KCMSD and its failure to appropriate adequate funds to correct these problems. Third, the improvements are not necessary in order to carry out the quality education components of the desegregation plan (testimony of Carla Santorno). Finally, the State contends that the $55,000,000 to $70,000,000 estimates made by the KCMSD and its architect E. Allen Roth, are excessive and that $20,000,000 would be sufficient to cover the health and safety problems which exist in the school district.

The State does not dispute that there are serious structural and environmental problems throughout the facilities utilized by the KCMSD. The State's argument that the present condition of the facilities is not traceable to unlawful segregation is irrelevant. *Tasby v. Wright, supra* at 97; *Haycraft v. Board of Education*, 585 F.2d 803, 805 (6th Cir.1978); *Clark v. Board of Educ. of Little Rock School District*, 465 F.2d 1044 (8th Cir.1972). Further, the State's argument that the present problems are due to a lack of maintenance on the part of the KCMSD is simply further evidence of the detrimental effects that segregation has had on this school district's ability to raise adequate resources. The State's argument that the facility improvements are not necessary in order to carry out the educational components of a desegregation plan fails to address this Court's responsibility in remedying the vestiges of segregation or in implementing a desegregation plan which will maintain and attract non-minority enrollment.

The Court finds that in order for other components of this plan to be effective, it is imperative that improvements be made in the KCMSD's facilities. In arriving at an equitable apportionment for the cost of facility improvements, the Court takes into consideration that KCMSD has spent somewhere between $15,000,000 and $18,000,000 in the implementation of Plan 6C for which it was not reimbursed and for the 1986 fiscal year has budgeted approximately $17,000,000 for desegregation programs which are not covered in this plan. KCMSD has available the sum of $10,000,000 for capital improvements. The Court is of the opinion that the State should match this figure plus an

additional $17,000,000 for immediate facility improvements. It will not be possible nor prudent to attempt to make all necessary facility improvements simultaneously. Therefore, as soon as possible, the KCMSD shall submit a $37,000,000 capital improvements plan developed by architects and engineers to the Monitoring Committee to be implemented as expeditiously as possible under a cost effective improvement program. After capital improvements have been made, it will be incumbent upon KCMSD to include in its budget funds for the maintenance of the improved facilities.

These initial improvements shall focus on the following three priorities: (1) eliminating safety and health hazards; (2) correcting those conditions existing in the KCMSD school facilities which impede the level of comfort needed for the creation of a good learning climate; and (3) improving the facilities to make them visually attractive. After the submission of the $37,000,000 improvement plan, KCMSD shall then review other capital improvements needed in order to bring its facilities to a point comparable with the facilities in neighboring suburban school districts. At this time the Court reserves judgment as to whether the State will be required to make any additional expenditures for capital improvements beyond the $37,000,000 set forth above.

Plan Administration

The success of this desegregation plan depends upon the KCMSD's ability to integrate this plan's components into ongoing district activities. Some administrative expenses are built into the component's budget, such as early childhood development, effective schools, voluntary interdistrict transfers, magnet schools and summer school. Some components will generate little, if any, administrative overhead, such as before and after school tutoring.

The Court, however, will order the KCMSD to hire an additional public information specialist at a total cost of $25,000 with

supplies and related expenses of $5,000 for a maximum expenditure of $30,000. This individual shall be responsible or developing and implementing a public information program regarding the KCMSD desegregation plan. The main focus of the public information effort shall be to solicit community support and involvement in the plan. Costs will be paid by the State of Missouri.

Beyond the public information program and the administrative expenditures built into the individual desegregation plan components, the KCMSD shall provide for administration of this plan with existing administrative personnel.

Monitoring Committee

Monitoring of the desegregation plan is an essential function to the success of the plan (testimony of Dr. Daniel Levine, Sue Fulson, Dr. Willis D. Hawley). The monitoring function is one which should be conducted by individuals or organizations independent of the parties involved, to enable the Court to have an objective assessment of the progress and problems encountered in implementing the desegregation plan.

There shall be a Monitoring Committee to oversee the implementation of this plan. The Committee shall be composed of ten individual members, four of whom shall be Black, four White and two Hispanic. It shall be organized as follows: A Budget Committee with three members, one of whom shall be the chairperson; a Desegregation Committee with three members, one of whom shall be the chairperson; an Education Committee with three members, one of whom shall be the chairperson; a general chairperson of the ten member committee who shall be an ex officio member of each of the three subcommittees; and an Executive Committee comprised of the general chairperson and the chairpersons of each of the three subcommittees.

The overall Monitoring Committee shall have the responsibility for conducting evaluations and collecting information and making recommendations for any modifications concerning the implementation of the plan.

At the outset, the Executive Committee should set out with specificity the areas of responsibility of each of the other three subcommittees. The Executive Committee shall have the responsibility of making all reports to the Court concerning progress or problems in the implementation of the plan. Each person on the Executive Committee shall have one vote. If however the Executive Committee is evenly divided on any issue, the general chairperson shall have the tie breaking vote. All decisions or recommendations of the Budget, Desegregation and Education Committees shall be referred to the Executive Committee for final review and action. Every attempt should be made by all members of the overall committee and each member of the subcommittees to reach an agreement on all issues and recommendations which will avoid bringing matters before this Court.

The members of the overall Monitoring Committee shall be selected by the Court. The State of Missouri, KCMSD and the American Federation of Teachers Local 691 (AFT 691) shall each submit the names of nine nominees for appointment to the Committees—three each for the Budget Committee, the Desegregation Committee and the Education Committee. One nominee submitted by each party will be appointed by the Court to serve on the committee for which the nominee was named. The plaintiffs shall submit the names of three nominees, one of whom will be appointed by the Court as the general chairperson of the Monitoring Committee. The nominees shall be submitted to the Court on or before Monday, July 15, 1985. Each nominee shall be prepared to attend a hearing to be held August 1, 1985 commencing at 10:00 a.m. The criteria this Court will use in selecting the general chairperson will include, among other things, the individual's independence from the parties in this

case, the individual's commitment to the implementation of the desegregation plan, the ability of the individual to spend the required amount of time in directing the committee's overall activities, and the individual's background as it relates to community involvement, education and other related matters. The general chairperson's role will be a pivotal one. The responsibilities will include insuring that the subcommittees are carrying out their functions in a responsible and efficient manner, that the Court is properly informed in a timely manner concerning problems and recommendations in regard to the desegregation plan and attempting to assist all parties involved in reconciling differences that might arise among themselves rather than presenting disputes for resolution by this Court.

Nominees submitted for each of the committees shall have experience and expertise in the areas of general responsibility of the committee for which they are nominated, they should be independent from any of the parties involved in the case, they should be committed to the successful implementation of the plan and have the ability to spend the time required to respond to the obligations of the committee.

Each member of the overall Monitoring Committee shall be appointed to serve a two year term. Any member of the Committee whose continued service is not in the best interests of the function of the committee may be removed by the Court for cause. Any vacancies shall be filled by the Court in the same manner in which the original appointment was made.

The Committee shall report to the Court at such times as it feels necessary concerning problems involved in the implementation of the plan except that it shall make an annual report on or before the first day of July of each year. The Committee shall have authority to make such investigations as it deems necessary in fulfilling its responsibilities for the monitoring of the plan.

To aid the Monitoring Committee in carrying out its function the Court establishes a monitoring office composed of an execu-

tive secretary with appropriate professional training and experience to be appointed by the Executive Committee of the general Monitoring Committee, along with a clerical employee with an annual budget of $142,200, the cost of which shall be borne solely by the State. The budget shall be composed of the annual salary for the executive secretary, including fringe benefits, not to exceed $50,000; the clerical employee's maximum salary, including fringe benefits, of $20,000; and there shall be $20,000 for equipment, supplies and other expenses for operation of the monitoring office. Office space for the monitoring office shall be furnished free of charge by KCMSD.

There shall be $52,200 made available for per diem payments to members of the Monitoring Committee. The general chairperson shall be paid $60 per hour for up to a maximum of 120 hours annually as per diem for that individual's efforts on behalf of the committee. The other committee members shall receive $50 per hour for up to a maximum of 100 hours per year as per diem for their efforts on behalf of the committee. Expenses incurred by members of the committee shall be paid out of the $20,000 budgeted for equipment, supplies and other expenses.

Financing Summary

In its September 17, 1984 order this Court stated that "much of the costs for preparing and implementing a plan to dismantle the vestiges of a dual school system in the KCMSD should be borne by the State." *Jenkins v. State of Missouri,* 593 F.Supp. 1485, 1506 (W.D.Mo. 1984). This determination was based upon the Court's earlier finding that the State had the "primary responsibility for insuring that the public education systems in the State comport with the United States Constitution." *Id.* at 1506. However, as a defendant found to be liable, KCMSD should pay for part of the costs involved in the implementation of this Plan.

The KCMSD has spent considerable funds on programs supporting desegregation within the district. (*See*, KCMSD Exh.

K-80, K-95, K-78, K-78A). In the upcoming year KCMSD has budgeted between $15,000,000 and $17,000,000 for programs directly or indirectly related to desegregation and has provided approximately $15,000,000 to $18,000,000 in funding for implementation of desegregation Plan 6C since 1977.

The State of Missouri shall bear the estimated costs involved for a period of three years in the following components:

	Ist Year	2nd Year	3rd Year	TOTAL
Improved Student Achievement	4,025,000	5,725,000	7,425,000	17,175,000
Voluntary Inter-District Transfers	open	open	open	open
Magnet Schools	85,000	open	open	85,000 (open)
Student Reassignment	175,000	open	open	175,000 (open)
Reducing Class Size	2,000,000	4,000,000	6,000,000	12,000,000
Administrative Costs	30,000	30,000	30,000	90,000
Staff Development	500,000	—0—	—0—	500,000
Summer School	222,500	454,500	454,500	1,131,500
AAA Status	2,369,250	1,419,250	1,419,250	5,207,750
All Day Kindergarten	546,000	546,000	546,000	1,638,000
Before & After School Tutoring	104,400	104,400	104,400	313,200
Early Childhood Development	616,674	616,674	616,674	1,850,022
Monitoring Office & Committee	142,200	142,200	142,200	426,600
Capital Improvements	27,000,000	open	open	27,000,000(open)
TOTAL	$37,816,024	$13,038,024	$16,738,024	$67,592,072

The KCMSD shall bear the estimated costs in the following components, many of which will be for a minimum of three years:

	Ist Year	2nd Year	3rd Year	TOTAL	
Summer School	222,500	454,500	454,500	1,131,500	
AAA Status	2,369,250	1,419,250	1,419,250	5,207,750	
All Day Kindergarten	546,000	546,000	546,000	1,638,000	
Before & After School Tutoring	104,400	104,400	104,400	313,200	
Early Childhood Development	616,674	616,674	616,674	1,850,022	
Capital Improvements	10,000,000	open	open	10,000,000	(open)
TOTAL	$13,858,824	$3,140,824	$3,140,824	$20,140,472	

The current operating levy for the KCMSD is $3.75 (State Exh. 18, testimony of Carl Struby). However, the $3.75 levy when, adjusted under § 164.013 of the Mo. Rev. Stat. (the proposition C rollback), results in the KCMSD having an operating levy of $3.26 (testimony of Carl Struby, KCMSD Exh. K-97). The $3.26 actual operating levy will be further reduced as a result of the state-wide reassessment (§ 137.073 Mo.Rev.Stat., testimony of Carl Struby). The uncontradicted testimony of KCMSD Board of Education treasurer Carl Struby is that the budget for the upcoming school year is presently $3,000,000 short of revenue and the only unallocated funds are an $850,000 to $1,000,000 contingency fund. Therefore, the KCMSD is presently unable to finance its portion of this school desegregation plan.

It is noted that legislation recently signed by the governor will permit the KCMSD to raise its reduced levy up to the preassessment level by a simple majority vote. Thus, after reassessment, local revenues will be able to be increased by a majority vote instead of the two-thirds vote which is presently required.

The presentation of a tax levy to the voters prior to the upcoming school year would be impossible because of the time constraints under which the school district is operating. Furthermore, it is extremely unlikely that such a proposal would receive the two-thirds majority presently required (testimony of Carl Struby, testimony of Sue Fulson).

The Eighth Circuit in the St. Louis desegregation plan recognized that "the district court's equitable power includes the remedial power to order tax increases or the issuance of bonds. . . ." *Liddell VII* at 1322. Further, the Eighth Circuit upheld the district court's increase of a tax levy when there was "no reasonable probability that such a tax levy would be approved by the required two-thirds vote in the aftermath of a desegregation order." *United States v. Missouri*, 363 F.Supp. 739 (E.D. Mo.1973), *aff'd*, 515 F.2d 1365, 1372 (8th Cir.), *cert. denied*, 423 U.S. 951, 96 S.Ct. 374, 46 L.Ed.2d 288 (1975). *See also, Griffin v. School Board*, 377 U.S. 218, 233, 84 S.Ct. 1226, 1234, 12 L.Ed.2d 256 (1964) (where the Supreme Court upheld a district court's order that the supervisors exercise their power to levy taxes to raise funds adequate to reopen, operate and maintain without racial discrimination a public school system).

While this Court has the necessary authority to order a tax increase to finance that portion of the desegregation plan for which the KCMSD has responsibility, this Court hesitates to take such action. When a Court considers the possibility of imposing a tax rate as an aspect of its desegregation decree, "there occurs a tension between two venerable maxims of the American tradition: 'Taxation without representation is tyranny' becomes the banner of some of those who are to be taxed, while the district court, safeguarding the effective implementation of its order, is deeply cognizant of the venerable phrase that "the power to tax involves the power to destroy." *McCullough v. Maryland*, 17 U.S. (4 Wheat), 316, 427, 4 L.Ed. 579 (1819); *Evans v. Buchanan*, 582 F.2d 750, 777 (3d Cir.1978), *cert. denied*, 446 U.S. 923, 100 S.Ct. 1862, 64 L.Ed.2d 278 (1980).

However, because the present financial resources of the KCMSD makes it impossible for it to appropriate funds necessary to implement the school desegregation order of this Court, and because of the extreme unlikelihood, due to the recent history of tax levy defeats and time constraints, that a tax levy proposal would be received favorably by two-thirds of the voting patrons of the KCMSD, it is hereby ordered that the tax levy rollback required by § 164.013 Mo.Rev.Stat., (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional $4,000,000 for the coming fiscal year. This one year procedure was utilized by the federal district court in the Eastern District of Missouri in *Liddell v. State of Missouri* 567 F.Supp. 1037, 1056 (1983), and upheld by the Eighth Circuit Court of Appeals in *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir.) (en banc), *cert. denied*, 469 U.S. 816, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984) (*Liddell VII*).

This rollback will be in effect for one year only. It will provide the KCMSD with an opportunity to present a tax levy proposal to its patrons at the next regularly scheduled school election. Therefore, it is ordered that the KCMSD shall submit a tax levy increase proposal to its patrons at the next regularly scheduled school election which, if approved, will provide funds sufficient to pay for its cost of the desegregation plan as previously outlined.

The implementation of a school desegregation plan must deal with constitutional law, state and local politics, educational theory and social relations, and do so all at the same time. Thus, a school desegregation plan is more than a legal principle implemented through this Court within the KCMSD, but a process which requires the cooperation of all parties, and general acceptance by KCMSD patrons as well as the citizens of the State of Missouri, in order to be truly successful. The plan adopted by this Court represents an effort to give meaning to the constitutional mandate expressed by the Supreme Court thirty years ago,

while seeking to be effective in the real world. The plan seeks to be supportive of those high principles which separate our society from those which lack a commitment to human dignity. But the success of this plan rests in others' hands, for to have a society where equal justice under the law is a "living truth" requires commitment of more than this nation's courts, but of the citizenry which those courts serve.

While jurisdiction is retained by this Court for certain matters as set forth in the foregoing order, the Court considers this order together with previous orders entered by this Court to be a final appealable judgment in this case. The Clerk is therefore directed to remove this case from the Court's docket.

APPENDIX C

IN THE UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: June 16, 1986]

Several motions are pending in this case including KCMSD's motion to amend the budget for the full-day kindergarten program, KCMSD's motion for an order permitting personnel hired for the desegregation programs to be paid according to salary schedule, KCMSD's motion for adjustment of the 1986/87 desegregation plan budget, KCMSD's motion for approval of the 1986/87 magnet programs. In addition, plaintiffs filed a motion seeking to clarify whether Kansas suburban schools are a part of the voluntary interdistrict transfer program. Intervenor AFT Local 691 filed a motion for an order for additional funds to finance the desegregation plan. The motions will be granted in part and denied in part as outlined below in the following order.

Public Information

This Court allocated $30,000 to allow KCMSD to hire an additional public information specialist whose responsibility was to develop and implement a public information program regarding the KCMSD desegregation plan. The main focus of that public information effort was to solicit community support

and involvement in the plan. There is little evidence that the district has fulfilled the intended goals of the Court's mandate in this area. Therefore, KCMSD shall develop and submit by August 1, 1986 a plan to the Desegregation Monitoring Committee detailing how the District plans to accomplish the public information goals for 1986/87.

IMPROVING STUDENT ACHIEVEMENT

Triple AAA Achievement

The Missouri Department of Elementary and Secondary Education's (DESE) annual evaluation of KCMSD revealed that the District had reached AAA status in all areas except one, KCMSD needs additional resources to meet the library or "school learning resource center" standards. The original library assessment was not conducted by trained library personnel (testimony of Casner, p. 91). After KCMSD hired additional professional librarians under the desegregation remedial plan a new evaluation was conducted and presented to DESE for review. The DESE and KCMSD's analysis as to materials needed is identical (testimony of Casner, p. 93).

Further, a projected increase in student enrollment for school term 1986/87 will require the hiring of one (1) additional librarian in order to continue to meet AAA standards in this area.

Finally, due to the KCMSD's established salary schedule many of the 125 professional staff and 31 teacher aides hired during year one of the desegregation program are eligible for increased compensation. Thus, actual year two costs, incorporating the increase in compensation, for 125 professional staff members and 321 teacher aides will be $3,821,786 (Testimony of Gaunt, p.170).

The hiring of art, music, physical education and planning time teachers, as well as teachers aides, has brought the District from AA to AAA rating in the areas of teaching load and curriculum.

The District now meets AAA standards for pupil personnel services through the hiring of additional counselors. And while additional library staffing may eventually be necessary to improve reading performances at low achieving elementary schools where a high proportion of economically disadvantaged minority students attend, KCMSD is now in compliance with AAA standards for librarians.

KCMSD is ordered to take those steps necessary to reach a AAA rating in all component areas during the spring 1987 DESE evaluation. Only one area lacks AAA rating: library resources. Sufficient funds will be provided to purchase, inventory and distribute the needed books and materials. The State of Missouri shall *not* grant AAA status to KCMSD based upon a *plan* to acquire the needed resources. A student cannot read a book until it is on the library shelf, or use a globe until it is at the school. Thus, the achievement of AAA ranking will be based upon the District's actual resource inventory.

KCMSD is to budget $8,790,697 in order to become a AAA ranked district by the end of the 1986/87 school term. The State of Missouri will pay a maximum of $4,737,380 of this total amount, with KCMSD paying the balance of $4,053,317. Any carryover from year one of the desegregation remedial plan will be used to reduce the State's and the KCMSD's contribution in 1986/87. That carryover shall include any unexpended funds from the $950,000 originally allocated for library resources during year one.

For the 125 professionals and 31 teacher aides, the State will pay a maximum of $1,910,893 and KCMSD shall pay an equal amount. For one additional librarian, the State of Missouri and KCMSD shall split the $32,750 maximum cost of salary and fringe benefits equally. The KCMSD will continue to charge the least expensive personnel to the desegregation budget when multiple hirings occur.

For shelving required for the additional library resources, the State of Missouri and KCMSD shall share equally the maximum cost of $90,225. In the area of library resources the State shall pay no more than $2,725,000 and KCMSD shall pay the projected balance of $2,040,936, bringing the projected total to $4,765,936 (including the $950,000 originally allocated in year one budget). The State's amount shall be a one time expenditure. KCMSD's amount, $2,040,936, slightly higher than that amount needed to maintain the AAA library resources on an ongoing basis (Testimony of Casner at p. 95) shall be used annually to insure maintenance of AAA standard library resources in the remaining years of this desegregation plan.

In order to achieve AAA ranking KCMSD will be allowed $80,000 in additional personnel costs on a one time basis in order to purchase, inventory and distribute library resources. KCMSD shall submit a budget for review and recommendation to the Monitoring Committee on or before July 3, 1986 for these funds, which shall be evenly divided between the State of Missouri and KCMSD.

KCMSD shall report to the Monitoring Committee at least every 60 days, beginning not later than August 1, 1986, on their progress towards reaching district-wide AAA ranking. The report shall be detailed and include a specific analysis of progress being made by the District towards the purchases and distribution of the required resources.

The Court is firmly convinced that AAA status can be attained by the next evaluation by the DESE. The KCMSD Board of Education, superintendent, and all administrative personnel must take whatever steps are necessary in order for the District to achieve AAA status before the end of the 1986/87 school term. Such an achievement is the cornerstone in the District's efforts toward improving student achievement. Substantial and sufficient resources are available for laying this cornerstone. When those resources are coupled with a commitment on the part of the

Board of Education and administrators to reach this goal, then KCMSD will once again take its place among the AAA rated schools of this state. This Court, through its Monitoring Committee, will closely monitor the progress of the District toward achieving this goal, and looks forward to next spring when the patrons, all parties, and the District can share in the pride of regaining the AAA rating for the first time since 1977.

Summer School

The summer school program for the summer of 1986 is presently budgeted at a cost of $909,000 evenly divided between the State of Missouri and KCMSD. KCMSD has requested a budget expansion to $1,434,649 and the removal of caps which were contained in the June 14, 1985 order relating to per student costs. While the per student caps will be removed, the total budget for the summer school program for the summer of 1986 shall be $996,000. In addition to the operating expenditures of $996,000, the summer school budget shall include a maximum of $200,000 for transportation. These costs will be evenly divided between KCMSD and the State. These figures are based upon projected enrollment at the elementary level of 1,480, 1,200 students at the junior high level and 1,000 students at the senior high level. A modified budget shall be submitted to the Monitoring Committee's Executive Committee as soon as possible but no later than July 3,1 986. Detailed explanations shall be required in regard to the expenditures outlined in the proposed budget for the categories of awards, food, repair and maintenance, tuition and fees, and workshops. Furthermore, a detailed transportation budget shall be presented to the Monitoring Committee for review and recommendation within the same time frame. The enrichment and cooperation program which was approved in the June 14, 1985 order of this Court shall be deleted from that order and the KCMSD will not be required to operate such a program during the summer of 1985.

By January 9, 1987, the District shall report to the Monitoring committee providing a detailed plan for the 1987 summer school program. This plan shall address the need to have continuity between the regular academic year and the summer school program as well as problem areas which have been identified in the December, 1985 summer school evaluation report and those identified in the next evaluation conducted by the KCMSD evaluation office. The report submitted to the Monitoring Committee shall address the specific recommendations for improving summer school contained in these evaluations, with specific attention being paid to the marketing of a summer school program to parents, improved communications with regular schools regarding the selection of students to attend summer school, reviewing the promotion/retention policy as it relates to summer school, and providing more planning time for teachers.

Full Day Kindergarten

The full day kindergarten program is projected to have a student enrollment of 3,482 for the upcoming 1986/87 school term. In addition, federal funds from Chapter I programs which were used during year one of the desegregation plan to pay for 21 full day kindergarten teachers will not be available for that purpose in year two. This is due to federal regulations which govern the Chapter I program. The increase in enrollment and the decrease in federal funding available for full day kindergarten teachers requires that changes be made in the June 14, 1985 order of this Court. In addition, KCMSD's established salary schedule requires that full day kindergarten teachers who taught during year one of the desegregation program, and will remain on staff for year two, are eligible for an increase in compensation.

KCMSD needs 158 kindergarten teachers for its projected enrollment of 3,482 kindergarten students. Prior to the remedial plan KCMSD had 100 non-Chapter I kindergarten teachers. Forty-one additional teachers were hired under year one of the desegregation plan. Thus an additional seventeen kindergarten

teachers will be needed for 1986/87 school term. The increase in compensation for year one kindergarten teachers is $26,496 (Testimony of Giles at p.31). Therefore, the KCMSD shall be allowed a maximum of 58 teachers, in addition to the 100 non-Chapter I kindergarten teachers in place prior to the remedial plan, at an average cost of $28,000. In addition, the District shall be allowed $26,496 to cover an increase in compensation for those teachers hired during year one of the desegregation remedial plan. Since a portion of these funds are being utilized to replace kindergarten teachers who were compensated from Chapter I federal funds, then the District shall report to the Monitoring Committee for review and recommendation, on or before August 1, 1986 concerning how the district plans to expend the Chapter I funds which are freed up by this additional expenditure. The Court will require that Chapter I funds freed up as a result of this order to be spent in a manner compatible with the desegregation remedial plan.

Finally, the public relations staff member hired as a part of this desegregation remedial plan shall report to the Monitoring Committee on or before August 1, 1986 concerning what strategies the District has in place to inform and recruit students to its full day kindergarten program.

Before and After School Program

The before and after school program was operated in ten schools in the District. However, only one of the ten schools had a before school component. Present funding is at $104,400. KCMSD has requested to expand the program to 20 schools with a budget of $275,433. Because of the plans to incorporate a before and after school component in the magnet school pan and because the District has only implemented a before school component in one of the ten schools, the District's request for expansion will be denied at this time. The before and after school program, as envisioned by this Court, based upon evidence presented during the remedial hearing in May of 1985, is a

program which has the opportunity for recruiting non-minority students. It is not exclusively a tutoring program but can serve as a program for before and after school supervision. Therefore, any tutoring which may be a part of this program need not be done by certified instructors but rather can be accomplished, as pointed out in the June 14, 1985 order by cross-age instruction or peer tutoring and parental involvement. Therefore KCMSD shall redesign its before and after school program to expand the before school component to more sites and shall analyze the present sites to determine whether or not they are the best sites for attracting desegregated enrollment. A revised budget, program sites, and a program synopsis shall be provided to the Monitoring Committee for review and recommendation on or before August 1, 1986.

Early Childhood Development Program

The present budget for the year two early childhood development program is $1,233,348. KCMSD proposes an increase in the budget to $1,551,787 as well as approval for the expansion of the opportunity classrooms in an amount equal to the carryover from the year one budget. The Court will approve the $1,551,786 budget but will require that any carryover from the year one budget be incorporated into that amount. Costs will be shared equally by KCMSD and the State.

The District shall report to the Monitoring Committee for review and recommendation on or before July 3, 1986 on its revised budget for the upcoming school term. Specifically, the District shall provide additional information concerning the following budget category areas: tuition and fees, membership dues, supplies and materials under both the parent education and parent involvement component, contractual services under the opportunity classrooms component, equipment and furniture (since the testimony was that these items had been purchased during year one of the program.)

In addition, KCMSD shall provide ongoing reports on the progress of this program to the Monitoring Committee. The District shall provide these reports at least quarterly, beginning August 1, 1986, and the reports shall include, at a minimum, information concerning enrollment, location site, staffing and budget expenditures.

Effective Schools

The effective schools component of the desegregation remedial plan seeks to foster parental, patron, teacher and field administration staff involvement in the improvement of student achievement. The Court sought that involvement because effective changes in schools comes from the "bottom up" and not from the "top down." The District has requested an increase of $250,000 in this program component area for four alternative schools. These schools are alternative schools with specialized programs and their enrollment is made up of 549 students from other schools throughout the District. The Court will expand the program to allow an allotment of $75,000 to be divided among these four schools on the basis of student population. In addition, this Court will reduce the overall expenditure for the effective schools program by the amount equal to those funds which were to be received by the seven magnet schools. Therefore, $525,000 will be subtracted from the overall allocation and $75,000 will be added to the balance, coming up with a total of $5,275.000 to be paid entirely by the State of Missouri. KCMSD will provide a budget for these funds to the Monitoring Committee for review and recommendation on or before August 1, 1986.

In order to achieve the goals of this program KCMSD shall not institute any procedures or strategies which would result in normal district level activities being paid for by the effective schools component. Nor shall KCMSD reduce any present district level activities and place the financial burden on individual schools to purchase these services utilizing effective school resources.

One of the critical areas in elementary schools identified in the May, 1985 remedial hearing was that of elementary reading alignment. Several components of this Court's order of June 14, 1985 were intended in part to support a major reading alignment effort. These components included effective schools, reductions in class size, staff development, and summer school. While some progress appears to have been made with respect to elementary reading alignment, the KCMSD's formative report of February, 1986 indicates that implementation problems have been encountered. The report states that some schools were continuing to "teach *all* the objectives in the Houghton Mifflin text, rather than the reduced number," that this decision may have had a negative impact on staff development, that the majority of the reading resource teacher's time was being devoted to curriculum development rather than assistance to schools regarding alignment and that the reading coordinator was hampered by a split assignment. The evaluation indicated that there was confusion surrounding the status of the alignment manual and that this confusion should be resolved as soon as possible.

In view of the importance of elementary reading alignment, an evaluation report will be prepared during September of 1986. The report's purpose will be to determine how well teachers are implementing alignment and identify what problems are being encountered throughout the district. The report shall include identification of critical actions, time schedules, deadlines, resource allocations, and other recommendations for solving problems encountered with respect to reading alignment. The evaluation will be conducted by an external evaluator as provided in the Monitoring Committee portion of this order.

At the secondary level, reading comprehension is of central importance in improving student achievement. The degrees of reading power program (DRP) was intended to be a tool to assist in improving student achievement and producing independent learners. It appears, however, that problems have been encoun-

tered in implementing the DRP program. Based on the formative evaluation report submitted to the Monitoring Committee in February of 1986 there is uncertainty about the program's leadership, a lack of teacher involvement outside the areas of English and reading, lack of instructional support, missing computer hardware and a lack of clarity regarding the program's philosophy and district commitment.

In view of the importance of reading comprehension at the secondary level, an additional progress report on the DRP program will be prepared and submitted by KCMSD to the Monitoring Committee on or before July 15, 1986 describing critical actions, time schedules, deadlines, resource allocations and other details of a plan for solving problems encountered with respect to the DRP program.

Another major intervention program designed to improve secondary school student's performance is the school within a school (SWAS) program. A February, 1986 evaluation made numerous recommendations regarding the effective implementation of SWAS including the development of a coordinated curriculum for each of the SWAS areas; improvement in policies and procedures, provision of adequate materials, supplies and equipment, and improvement of staff development. KCMSD is ordered to submit a detailed plan for improved implementation of the SWAS program in 1986/87. This report should be submitted to the Monitoring Committee on or before August 1, 1986. The report shall include details concerning how much time of individual personnel involved will be devoted to SWAS program, as well as details on funding, staffing, staff development and time schedules for 1986/87.

Voluntary Interdistrict Transfer

The State of Missouri was given the responsibility for actively seeking the cooperation of each school district in the Kansas City, Missouri metropolitan area in a voluntary interdistrict

transfer program (VIDT). On June 4, 1986, the State of Missouri provided this Court with written responses from eleven suburban school districts. All school districts stated that they were not interested in becoming involved in a transfer program at this time. Several of the districts stated that their refusal to participate was based upon the pending litigation between KCMSD and themselves.

Some communication between the State and the Missouri suburban districts must be conducted confidentially. However, as an arm of the Court, the Monitoring Committee has the responsibility for overseeing what progress is being made in each of the components of the desegregation remedial plan including VIDT. The Committee cannot function, and thus the Court cannot properly respond, unless the parties provide it with sufficient information.

Beginning immediately, the State of Missouri shall renew contacts with the Board of Education of the individual Missouri suburban school districts in the Kansas City Missouri metropolitan area concerning a voluntary interdistrict transfer program. The State will actively seek the cooperation of those districts in establishing such a program. In addition, the State shall seek to identify the present policy of each district in regard to accepting students on a tuition basis from outside their district, the conditions under which the district would consider participation in a voluntary transfer program, the number of students the District will be interested in accepting from KCMSD and the number of students who may transfer to the KCMSD. Furthermore, the state of Missouri shall report on the effort that has been made with each district and the results of those efforts. The reports will be due on or before October 1, 1986, January 9, 1987 and a final report will be due by May 29, 1987. Communication between the State and the districts will be kept in the strictest confidence by all parties to the communication and by all members of the Monitoring Committee.

Since the voluntary interdistrict transfer program could provide a significant opportunity for additional desegregation of KCMSD schools as well as desegregative educational experiences for KCMSD students, the State of Missouri must demonstrate that they are seriously committed to seeking the cooperation of each suburban school district in the Kansas City, Missouri metropolitan area. If the State does not demonstrate its commitment, then this Court will seek other methods of accomplishing this task at the State's expense. While recognizing that pending litigation does impact upon the suburban District's decision, the State should explore with suburban districts the conditions under which they would consider participation in order to reap the educational and financial benefits that are a part of this program.

Desegregation Monitoring Committee

The Desegregation Monitoring Committee is an arm of this Court. A request for information from the Committee should be treated by all parties as a request for information from this Court. Upon receipt of a request for information a party will respond in a prompt and thorough manner. If additional time is needed, an immediate request for such should be made to the Committee and the Committee is instructed to grant extensions of time when reasonable. However, if a party determines that it will not respond to a request for information from the Committee, for whatever reason, the party should immediately inform the Court of its intention, specifically stating the reasons.

The Committee has shown itself to be an effective and impartial group committed to achieving the goals outlined in this Court's plan. Cooperation by all parties with the Committee will assist everyone in achieving the goals of the plan and is viewed by this Court as a responsibility which every party has.

In order to continue the functions outlined by this Court in the June 14, 1985 order the budget for the Monitoring Office will be increased from its present level of $142,000 to a total of $187,950.

Funds for the budget will come exclusively from the State of Missouri. This $45,750 increase represents a $4,000 increase in the operating budget, a 2 1/2% increase in salaries and fringe benefits, and a $40,000 increase in research funds. The $40,000 research pool may be utilized by the Committee for the purpose of completing specific research projects. There will be no change in the per diem budget for Monitoring Committee members; the Court is aware that there may be a variation in the amount of time spent by members of the different committees, therefore during the budget year, which begins July 1, 1986, if the Executive Committee deems necessary, it may request from this Court approval of a reallocation of funds in order to insure that sufficient per diem allocations are made for individual committee members.

REALLOCATION OF YEAR ONE BUDGET

KCMSD has requested authorization from this Court for reallocation of funds under the full day kindergarten component. Enrollment in the full day kindergarten program was greater than originally anticipated resulting in a number of class sizes in excess of 25 students. KCMSD has 3,308 students enrolled in kindergarten as of January, 1985. In January of 1986 this number had increased to 3,363. Additional kindergarten teachers were needed because of this enrollment increase. As a result, the KCMSD hired 41 additional teachers, rather than the 39 additional teachers included in the June 14, 1985 order. KCMSD will be allowed to reallocate funds in the year one budget and pay for the two additional teachers hired for the full day kindergarten program out of the desegregation plan. In addition any remaining unallocated funds from the year one budget may be used to purchase furnishings and equipment for the added kindergarten rooms. However, the total amount of funds to be spent during the year one budget shall not exceed $1,092,000 with KCMSD and the State of Missouri paying equal shares of the total amount expended.

SALARY SCHEDULE

The June 14, 1985 order stated that in hiring personnel the KCMSD would be limited to a maximum cost of $28,000 for professional staff including fringe benefits. The maximum cost for individual teacher aides was to be $9,500 including fringe benefits. KCMSD is required to pay new personnel according to existing salary schedules. The District is now seeking a change in the June 14, 1985 order which would remove the cap on salaries set at $28,000 for professionals and $9,500 for teacher's aides and instead utilize those figures as averages. KCMSD's request will be granted and the District will be limited to an average cost of $28,000 for professionals including fringe benefits and $9,500 for teachers aides including fringe benefits. However, the total amount of funds which were budgeted for the affected components will not be increased. The KCMSD shall continue to charge the least expensive personnel to the desegregation budget when multiple hirings occur.

CAPITAL IMPROVEMENTS

A comprehensive capital improvement study has been completed by KCMSD and a report presented to the Monitoring Committee and this Court, detailing specific capital improvement needs by school. The original $37,000,000 budgeted in year one of the desegregation plan has been allocated toward the most critical capital improvement needs of the District. In the June 14, 1985 order this Court took note of the deteriorating conditions of the District facilities including safety and health hazards, educational environment impairments, functional impairments as well as impairments in the appearance of the facilities. This Court also found that improvement of school facilities is an important factor in the overall success of this desegregation plan and ordered the District to complete a study to determine what needed to be done in order to bring its facilities to a point relatively equal with the facilities in neighboring suburban school districts. This Court reserved judgement in the

June 14th order as to whether additional expenditures for capital improvements beyond the initial $37,000,000 would be required to be made by the State of Missouri. At that time the Court also stated that after the capital improvements have been made it would be incumbent upon KCMSD to include in its budget funds for the maintenance of those improved facilities.

This Court will order additional capital improvements to be made. The State of Missouri will pay for these additional improvements. The Court authorizes the expenditure of up to $4,063,154 for capital improvements as outlined in the capital improvement study for schools in the Southwest Cluster. The Court authorizes the expenditure of up to $3,468,004 for the Swinney and Volker Elementary Schools. Finally, the Court authorizes the expenditure of up to $5,346,172 at the Lincoln North Academy. Total capital improvement expenditures to be paid for by the State are $12,877.330. In order to complete these capital improvements without displacing students from those schools the District is authorized to use up a maximum of $480,000 of these funds for the purchase of classroom modules, if absolutely necessary. The District will be required to provide reports on at least a quarterly basis, beginning August 1, 1986, to the Monitoring Committee on progress being made in completing the capital improvements at the designated schools. Specifically these reports should detail the amount of work completed, the amount of funds expended, and the balance of work to be done. In addition, the District shall present on or before January 5, 1987 a plan to the Monitoring Committee detailing how the District will maintain the capital improvements made as a result of the desegregation plan, including last year's work. This report will include budget estimates and how the District plans to raise sufficient funds for the maintenance of the improved facilities. The District shall also report to the Monitoring Committee on or before January 5, 1987 on the need for future capital improvements. Specifically the District shall present a report outlining what capital improvements remain to

be done, the amount of funds required to achieve these improvements and a timetable. The report shall specifically detail what components of the capital improvements plan are considered by the District to be related to eliminating safety and health hazards, what portions are related to correcting conditions existing in the facilities which impede the level of comfort needed for creating a good learning climate, and what portions of the improvements relate to making the facilities visually more attractive.

MAGNET SCHOOLS

Magnet schools can be utilized to assist in expanding the desegregative educational experience for KCMSD students. A key to success is the commitment of the Board of Education, the superintendent, the administration, the staff of the schools, and the parents and patrons. That commitment, when coupled with quality planning and sufficient resources can result in the establishment of magnet schools which can attract non-minority enrollment as well as be an integral part of district-wide improved student achievement.

KCMSD has presented to the Court a magnet school proposal for school term 1986/87. This proposal would include the three schools of the Southwest Cluster Investigative Learning Magnet, the Westport Community Applied Learning Magnet and the Lincoln College Preparatory Magnet. The themes, staffing, curriculum and budget are based upon thorough area-wide surveying in compliance with this Court's June 14, 1985 order. The plan incorporates input from parents, patrons and professionals from throughout the District. It has substantial support within the KCMSD and has the potential for demonstrating the central administration's ability to effectively implement and manage substantial educational improvements within the District.

The long term goal of this Court's remedial order is to make available to *all* KCMSD students educational opportunities

equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district. In achieving this goal the victims of unconstitutional segregation will be restored to the position they would have occupied absent such conduct, while establishing an environment designed to maintain and attract non-minority enrollment. A review of this magnet school plan has been conducted in light of this goal. While the resources requested are substantial, the constitutional violations found to exist were also substantial. While the number of individual students benefited during the first year of the magnet school program will not be large, the individual benefit for each of those students will be very large and the long term benefit to the District is worthy of such an investment. Therefore, this Court is ordering the implementation of the Kansas City, Missouri School District's magnet school plan with specific modifications.

At the Southwest Cluster KCMSD shall institute a fully magnetized school program in school term 1986/87. This program will include an extended year program with a budget of $423,500. The budget for nonsalary items will be $497,820. The personnel budget will be $3,777.116. This is a reduction in the amount of funds requested for personnel. The goals established for student teacher ratios within the magnet school plans will be deleted from the plan. The goals established for reduced class size in the June 14, 1985, order will be substituted in their place. In order to meet the goals established for student teacher ratios in the June 14, 1985 order the Districts will use funds over the next two school terms made available from the reduced class size component of the desegregation plan. However, the reduced class size component of the plan is a district wide component and the goals established shall be reached throughout the District without preference to magnet schools. These reduced class sizes, ones which were presented for adoption by KCMSD are more than sufficient to provide quality educational opportunities, individualized attention, and attract both minority and non-

minority enrollment. Enrollment shall be as outlined in the magnet school plan. Therefore, the total operating budget for the Southwest Cluster Investigative Learning Magnet will be $4,698,436. The District will be required to pay for $2,590,598 and the State will be required to pay $2,107,838.

The Court will order the implementation of the Westport Community Applied Learning Magnet consisting of Swinney and Volker Elementary Schools. Total budget for the Westport Magnet School will be $3,522,031. Non-salary items will be budgeted at a maximum of $357,082 with the extended year program budget being $423,500. Personnel costs shall be limited to $2,741,499 with the same limitations on student teacher ratios as outlined previously in regard to the Southwest Cluster. The goals established for student teacher ratios in the June 14, 1985 order will be used for the magnet schools and funds from the reduced class size component over the next two school terms shall be utilized in order to reach those goals. KCMSD will be required to fund a total of $1,703,259 for Swinney Volker with the State paying $1,818,772.

The Court will order the implementation of the Lincoln College Preparatory Magnet Program in the school term of 1986/87. The total budget for this program will be $4,152,260. The non-salary component of the budget will be $1 ,318,493 and the extended year program will have a budget of $90,000. Personnel costs will be no more than $2,743,767 with the same limitations placed on personnel as outlined for the previous magnet schools. That is, that the goals established in the June 14, 1985 order in regard to reduced class sizes shall be inserted in place of the goals established in the proposed magnet school plan. Funds shall be made available from the reduced class size component over the next two school terms in order to reach those goals. KCMSD will be required to pay $1,723,246 of the total Lincoln Magnet School budget with the State being required to pay a maximum of $2,429,024.

Quality planning, commitment of the superintendent and administrators, and responsible management, are absolutely necessary to insure that the resources approved by this Court for magnet schools are effectively and efficiently used to reach the goals of the remedial plan. Therefore, this Court will authorize a budget of $600,000 for administration of the magnet school program. Specifically, $164,835 will be allowed for central administration with $435,165 being made available for marketing and for planning to avert resegregation. This cost will be evenly borne by the State and the District.

The total amount of funds budgeted for the magnet school program will be $12,972,727 with the District paying $6,317,093 and the State paying $6,665,634.

In implementing the magnet school program in school term 1986/87 the District shall utilize the same desegregation goals for kindergarten that have been established for other grades and schools. The goal established for desegregative enrollment of 50% minority and 50% non-minority shall be measured on the grade and school level and not only on the elementary cluster level. The training provided for the staff of these magnet schools is extremely important and at least 70 hours of the total training package shall be conducted prior to the beginning of the school term with the total training package being approved by the Monitoring Committee prior to its implementation. Therefore, the training program shall be submitted for review and action by the Committee on or before July 25, 1986. Furthermore, the District shall utilize its standard involuntary transfer policy and procedures in regard to the vacated positions at these schools and shall adhere to the work day length agreement reached between the District and the AFT Local 691.

Further development of the magnet school program must be based upon making magnet schools an integral part of an overall effort to improve educational achievement. The magnet plan must be geared toward both remedial and desegregative goals

and should maximize achievement of desegregation with a minimum amount of resources. The magnet program should provide long term stability in terms of future financing as well as incorporate a carefully designed marketing program based upon a clearly defined themes and curriculums. Finally, a quality magnet program should be based upon a careful analysis of the plans' impact upon other components of the desegregation plan. Thus, future development of a magnet school program need not duplicate this initial phase of the magnet school effort. The District should provide to the Monitoring Committee and all parties a copy of their comprehensive magnet school program proposal on or before August 1, 1986. It will be measured against the criteria as outlined in this order.

FINANCING SUMMARY

Following is an outline of the year two desegregation budget:

	KCMSD	STATE	TOTAL
All Day Kindergarten	797,248	797,248	1,594,496
AAA	4,053,317	4,737,380	8,790,697
Before & After School	52,200	52,200	104,400
Effective Schools		5,275,000	5,275,000
Summer School	598,000	598,000	1,196,000
Reduced Class Size		4,000,000	4,000,000
Capital Improvements		12,877,330	12,877,330
Administration		30,000	30,000
Monitoring Committee		187,950	187,950
Magnet Schools	6,317,093	6,655,634	12,972,727
Voluntary Interdistrict Transfer	open	open	open
Student Reassignment	open	open	open
Early Childhood Development	775,893	775,893	1,551,786
TOTAL	12,593,751	35,986,635	48,580,386

Except in the full day kindergarten component, any carryover from year one shall be used to fulfill year two budget requirements within the component.

CONCLUSION

All parties, and all persons delegated with the responsibility for implementation of any portion of this plan, should clearly understand that this Court expects the plan to be implemented in a thorough and efficient manner. Whether agreeing or disagreeing with its individual components, the parties must comply with this plan as much as any statute and this Court will require each party and all individuals delegated with responsibilities for implementation to make a diligent effort, to carry out this plan. Failure to make a diligent effort may result in sanctions against a party or individual.

/s/ Russell G. Clark
RUSSELL G. CLARK,
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: June 16, 1986

APPENDIX D

IN THE UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: August 25, 1986]

The Kansas City Missouri School District (KCMSD) has moved this Court for an order enjoining the rollback in the real estate tax levy otherwise required under lProposition C. (R.S. MO §§163.057 and 164.013).

Responses to the motion have been filed on behalf of the plaintiffs and the State of Missouri. Plaintiffs support the motion. The State urges that KCMSD be required to pay its share of desegregation costs; it takes no position as to the method through which KCMSD obtains the funds to meet its burden.

In previous memorandum opinions issued, this Court has set forth detailed findings of fact and reasoned statements of law regarding constitutional violations practiced by the State and the KCMSD as well as comprehensive plans in an effort to place the victims of the violations in substantially the position which they would have occupied had the violations not occurred. The Court will not repeat in this order in any detail previous findings of fact and conclusions of law set forth in previous opinions.

The Court has found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts, large number of students leaving the schools of Kansas City and attending private schools and that it has caused a system wide reduction in student achievement in the schools of KCMSD. It has also found that by improving the quality of education in the KCMSD, it will enhance the appeal of the school system, thus giving it a chance to regain its present white enrollment and also encourage whites in private and suburban schools to enroll in its schools. As set forth in its order of June 14, 1985, the basic remedial principle in school desegregation cases, is that "the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

As indicated in its order of June 14, 1985, this Court is aware that there are limitations on the remedial powers of a federal court to correct constitutional violations. While remedies in desegregation cases are drawn from the heart of equity, they should not be broader in scope than necessary to restore the victims of the violations to the position they would have occupied in the absence of such conduct.

Before issuing the remedial order of June 14, 1985 and the amendment thereto entered June 16, 1986, this Court was of the firm conclusion that the plans were not wider in scope than necessary to correct the constitutional violations and to restore the victims thereof to the positions which they would have occupied in the absence of such violation. The United States Supreme Court observed in *Watson* v. *Memphis*, 373 U.S. 526, 537, 83 S.Ct. 1314, 10 L.Ed.2d 529 (1963), "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

It was held in *Henry* v. *County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir. 1970) that the remedial power of

the federal courts under the Fourteenth Amendment is not limited by state law. *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971) held that state policy must give way when it operates to hinder vindication of federal constitutional guarantees.

A federal court's authority to impose or raise taxes has been recognized by the United States Supreme Court in *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964) and *Louisiana ex rel. Hubert* v. *Mayor and Council of New Orleans*, 215 U.S. 170, 30 S.Ct. 40, 54 L.Ed. 144 (1909) and by the Eighth Circuit Court of Appeals in *United States* v. *Missouri*, 515 F.2d 1365 (1975) and in *Liddell* v. *State of Missouri*, 731 F.2d. 1294 (1984).

Judge Stephenson stated in *United States* v. *Missouri*:

> It is anomalous to suggest that the district court has the power to disestablish a dual school system and does not have the power to fashion an appropriate remedy.

515.F.2d at 1372.

The court in *Liddell* v. *State of Missouri*, 731 F.2d at 1320 stated:

> We hold that the district court's broad equitable powers to remedy the evils of segregation include a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be exercised only after exploration of every other fiscal alternative.

The Court then set forth some of the alternatives which should be pursued.

In the Court's order of June 16, 1986, it assessed the KCMSD's portion of the desegregation budget for the fiscal year 1986-87 at $12,593,751.00. The KCMSD contends, and the Court so finds, that revenues available to it for the 1986-87 fiscal year are

insufficient by $6,300,000 to meet its share of the desegregation budget. Unless it can obtain additional funds the only alternative it has is to make major reductions in services of its regular educational program. The Court is of the opinion that this would be in rect conflict with the goals sought to be obtained through the desegregation plan.

KCMSD has made eight attempts in the last seventeen years to obtain voter approval of an increase in the tax levy. The last two attempts were in February and August of 1986 which required only a majority vote for approval. Obviously it would be futile to submit a bond issue which would require a two-thirds majority for approval. KCMSD has made efforts to obtain funding from charitable and civic groups. It has also approached the city council in regard to an additional sales tax without success and was unsuccessful in obtaining any appreciable extra funds from the state legislature. The District has made a diligent effort, though unsuccessful, to obtain funding for its share of the desegregation budget for the present fiscal year. Thus it appears that the only alternative left for the KCMSD is to seek relief from the Court.

The Court has previously held that the State should pay the major cost of a desegregation plan but that the KCMSD, also a violator, should share in that cost.

The Court stated at page 43 of its June 14, 1985 order that it was reluctant to take any action to increase taxes. The Court is not insensitive to the fact that a majority of those patrons of KCMSD who chose to vote in February and August of 1986 were opposed to a tax levy increase. However a majority has no right to deny others the constitutional guarantees to which they are entitled. This Court, having found that vestiges of unconstitutional discrimination still exists in the KCMSD, is not so callous as to accept the proposition that it is helpless to enforce a remedy to correct the past violations. Failure of the KCMSD to come forward with its share of funds to implement the remedial plan

would certainly operate to hinder vindication of federal constitutional guarantees to which the school children in the KCMSD are entitled. This Court cannot shirk its sworn duty to uphold the Constitution of the United States. Therefore, it is hereby

ORDERED that the motion of the KCMSD to enjoin the rollback in the real estate tax levy otherwise required under Proposition C is granted; and it is further

ORDERED that the tax levy rollback required by §164.013, R.S. MO (the Proposition C rollback) shall be enjoined to the extent necessary to raise an additional Six Million Five Hundred Thousand Dollars ($6,500,000.00) to enable the KCMSD to meet its share of the desegregation plan for the current fiscal year.

/s/ Russell G. Clark
RUSSELL G. CLARK,
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: August 25, 1986

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: November 12, 1986]

On June 16, 1986, this Court directed the Kansas City, Missouri School District (KCMSD) to submit a proposal for a comprehensive magnet school program by August 1, 1986. The KCMSD filed its proposal on August 13, 1986 along with its motion requesting approval and funding of the plan. The Court conducted hearings on KCMSD's motion during the week of September 15, 1986 and again on October 9 and 10, 1986. After careful consideration of the evidence presented, the Court will grant the motion in part and deny it in part. The Court will order implementation of the magnet plan as submitted and will approve the proposed budget to fund the plan. The Court will approve the capital improvements and new construction requested for magnet schools at the cost estimated by the KCMSD. The Court will find the State of Missouri and the KCMSD jointly and severally liable for approximately $53,000,000 of the estimated $143,000,000 budget approved for implementation of the magnet school plan. The State of Missouri will be solely liable for the remaining costs of the implementation. The Court will find the State of Missouri and KCMSD jointly and severally

liable for costs of the capital improvements and new construction estimated at $53,000,000.

Magnet School Plan

The Court requested the KCMSD to submit a comprehensive magnet school proposal for consideration as part of the Court's overall plan to eliminate the vestiges of unlawful segregation in the KCMSD and to avoid future constitutional violations. The implementation of magnet schools as a tool to desegregate is within the equitable powers of a Court in fashioning a remedy in a school desegregation case. In its order dated June 14, 1985, the Court reviewed these equitable powers and will not do so here. In response to the Court's request, the KCMSD submitted a long-term magnet school plan that was the product of extensive research, experience and planning of nationally respected experts on magnet schools. The plan proposes that every senior high school, every middle school, and approximately one-half of the elementary schools in the KCMSD will become magnet schools by the school year 1991-92. The plan proposes numerous magnet themes ranging from foreign languages to performing arts to science and math. Each magnet school would, however, retain the basic academic curriculum offered in the district.

The State of Missouri contends that the proposed magnet plan was hastily drafted and that it magnetizes too many schools over too short a time period. The State suggests that magnet schools should be implemented more gradually, based upon the experience of earlier schools. While the Court is mindful of the State's position, it is convinced that the students who are presently enrolled in the KCMSD are entitled to a vindication of past denial of constitutional rights now.

The Court finds that the proposed plan would serve the objectives of its overall desegregation program. First, the carefully chosen magnet themes would provide a greater educa-

tional opportunity to *all* KCMSD students. The plan magnetizes such a large number of schools that every high school and middle school student will attend a magnet school. At the elementary level, there would be a sufficient number of magnets to permit every student desiring to attend a magnet school to do so. The Court is opposed to magnetizing only a limited number of schools in a district even though such plans have been approved by the Eighth Circuit Court of Appeals and the United States Supreme Court. The philosophy of a magnet school is to attract non-minority students into a school which is predominantly minority. It does so by offering a higher quality of education than the schools which are being attended by the non-minority students. In each school there is a limitation as to the number of students who may be enrolled. Thus, for each non-minority student who enrolls in the magnet school a minority student, who has been the victim of past discrimination, is denied admittance. While these plans may achieve a better racial mix in those few schools, the victims of racial segregation are denied the educational opportunity available to only those students enrolled in the few magnet schools. This results in a school system of two-tiers as it relates to the quality of education. This inequity is avoided by the KCMSD magnet school plan.

The Court also finds that the proposed magnet plan would generate voluntary student transfers resulting in greater desegregation in the district schools. The suggested magnet themes include those which rated high in the Court ordered surveys and themes that have been successful in other cities. Therefore, the plan would provide both minority and non-minority district students with many incentives to leave their neighborhoods and enroll in the magnet schools offering the distinctive themes of interest to them. Most importantly, the Court believes that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs.

The KCMSD proposes a budget of $142,736,025 for implementation of its comprehensive magnet school plan over a six-year period. See Attachment A. The KCMSD admits that the proposed budget consists of studied estimates which would be adjusted as actual costs are ascertained. While the resources requested are substantial, the constitutional violations committed were also substantial. The Court has carefully reviewed the proposed budget and finds that the estimated costs are reasonable. The long-term benefit of all KCMSD students of a greater educational opportunity in an integrated environment is worthy of such an investment.

For the reasons stated, the Court orders the implementation of the proposed magnet school plan as a fundamental component of its overall desegregation remedy and approves the budget at the cost estimated by the KCMSD.

Capital Facilities Program

The KCMSD also requests approval and funding of capital improvements to eleven of the district schools that it proposes to become magnets in September 1987, and for the construction of four new school facilities to be used as magnets beginning September 1988. The specific schools and the cost estimates for the work requested are listed in Attachment B. In response to KCMSD's request, the State of Missouri argues that the present condition of the district school facilities is not traceable to unlawful segregation but is due to a lack of maintenance by the KCMSD. The Court finds that even if the State by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system did not directly cause the deterioration of the school facilities, it certainly contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools. Furthermore, the capital facilities program requested by the KCMSD is a proper remedy through which to remove the

vestiges of racial segregation, and is needed to attract non-minority students back to the KCMSD.

The KCMSD proposes a budget of $52,858,301 for the capital improvements to the eleven existing schools and the construction of four new facilities. The budget consists of studied estimates which would be adjusted as actual costs are ascertained. After careful consideration of the capital facilities work requested, the Court finds that the estimated costs are reasonable.

For the reasons stated, this Court orders that the requested capital improvements be made to the eleven existing schools and that four new facilities be constructed at the costs estimated by the KCMSD. The Court orders that sites be acquired for Central High School, New Paseo Middle School, and New West Elementary School. The Court approves the rehabilitation of the Jewish Community Center or a comparable facility for use as a performing arts school in 1987-88 until the New Paseo Middle School is constructed.

In its motion filed August 13, 1986, the KCMSD also requested that the State of Missouri be required to fund the construction of the New Northeast and New Southeast Elementary Schools, and site expansions to facilitate magnet themes at Pitcher Elementary, Garfield Elementary, Northeast Middle School, Central Senior High School, and East Senior High School. The Court denies these requests at this time because these magnet programs are not scheduled for implementation before 1989-90.

Funding

In its order of September 17, 1984, this Court found that the State of Missouri and the KCMSD had violated the constitutional rights of the plaintiffs. To date, the State of Missouri has borne most of the costs of the Court's overall plan to remove the

vestiges of unconstitutional segregation from the KCMSD. This was based on the Court's earlier determination that the State had the "primary responsibility for insuring that the public education systems in the State comport with the United States Constitution." *Jenkins* v. *State of Missouri*, 593 F. Supp. 1485, 1506 (W.D. Mo. 1984). The KCMSD, which includes its citizens, must be called to help remedy the conditions for which it is partially responsible. Accordingly, the Court orders that the KCMSD and the State of Missouri are jointly and severally liable for the cost of the capital facilities program estimated at $52,858,301. The KCMSD and the State of Missouri are also jointly and severally liable for the cost of site acquisitions for Central High School, New Paseo Middle School, New West Elementary School and the cost of rehabilitation of the Jewish Community Center or a comparable facility for use as a performing arts magnet in 1987-88. These costs were not included in the KCMSD's capital facilities estimate.

It is further ordered that the KCMSD and the State of Missouri are jointly and severally liable for the following costs of the implementation of the magnet school plan approved by the Court:

$8,316,272 in 1986-87
$8,908,406 in 1987-88
$8,908,406 in 1988-89
$8,908,406 in 1989-90
$8,908,406 in 1990-91
$8,908,405 in 1991-92

The result is that the KCMSD and the State of Missouri are jointly and severally liable for $52,858,301 of the $142,736,025 that the KCMSD estimates is required to implement its magnet school plan. The Court further orders that the State of Missouri is solely liable for the balance of the costs of implementation, or $89,877,724.

All judgment amounts are based upon studied estimates provided by the KCMSD and may be adjusted when the actual costs of the capital facilities work and the magnet school plan ordered by the Court are ascertained. The State of Missouri will not be permitted to withhold foundation formula payments or state transportation funds due the KCMSD in order to recover any contribution for money paid by the State on the joint and several judgments.

The Court is aware that the magnet plan will require a more extensive program for the transportation of students than presently exists. The KCMSD has not submitted a budget for the actual cost of transportation required by the plan claiming the costs cannot be predicted with accuracy until the District gains experience in determining from where the students attending the particular magnet schools will come. The Court will defer its assessment as to the extent of the need for transportation and the liability for the cost of same until such time as realistic estimates for the needs and cost are available. The KCMSD is ordered to provide this Court with estimated costs of the transportation required for implementation of the plan in 1987-88 on or before August 15, 1987.

The KCMSD may extinguish its liability for the $52,858,301 portion of the implementation cost of the magnet school plan by passing a $53,000,000 school capital improvement bond issue. If this should occur, the State of Missouri would no longer be liable for the $52,858,301 in capital facilities work ordered by the Court.

The Court also wishes to point out that during the course of this lawsuit the Court has not been informed of one affirmative act voluntarily taken by the Executive Department of the State of Missouri or the Missouri General Assembly to aid a school district that is involved in a desegregation program. By making approximately $105,000,000 of the judgments joint and several,

the General Assembly may be encouraged to explore the possibility of enacting legislation that would permit a district involved in a desegregation plan more versatility than it presently has to raise funds with which to support the program.

For the reasons stated, it is hereby

ORDERED that the KCMSD's motion for approval of its long-range magnet school plan is granted in part and denied in part as set forth in this memorandum.

/s/ Russell G. Clark
RUSSELL G. CLARK,
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: November 12, 1986

ATTACHMENT "A" — MAGNET SUPPORT BUDGETS

MAGNET SUPPORT BUDGET

	FTE	1986-87	FTE	1987-88	FTE	1988-89	FTE	1989-90	FTE	1990-91	FTE	1991-92
		Year 1		Year 2		Year 3		Year 4		Year 5		Year 6
MAGNET OFFICE												
Associate Superintendent	1.0	$66,782	1.0	$70,121	1.0	$73,627	1.0	$77,309	1.0	$81,174	1.0	$85,233
Director	3.0	$189,888	3.0	$199,382	3.0	$209,352	3.0	$219,819	3.0	$230,810	3.0	$242,351
Ombudsman	1.0	$46,633	1.0	$48,965	1.0	$51,413	1.0	$53,984	1.0	$56,683	1.0	$59,517
Grants Specialist	1.0	$46,633	1.0	$48,965	1.0	$51,413	1.0	$53,984	1.0	$56,683	1.0	$59,517
Clerical	5.0	$93,000	5.0	$97,650	5.0	$102,533	5.0	$107,659	5.0	$113,042	5.0	$118,694
Equipment		$135,000		$20,000		$15,000		$10,000		$10,000		$10,000
Supplies & Material		$15,000		$10,000		$10,000		$10,000		$10,000		$10,000
Mileage		$10,000		$10,000		$10,000		$10,000		$10,000		$10,000
Travel		$15,000		$15,000		$15,000		$15,000		$15,000		$15,000
Contracted Services		$75,000		$30,000		$30,000		$30,000		$30,000		$30,000
District Task Forces		$90,000		$120,000		$100,000		$85,000		$75,000		$75,000
Telephone		$10,000		$10,000		$10,000		$10,000		$10,000		$10,000
Contract Maintenance		$40,000		$40,000		$40,000		$40,000		$40,000		$40,000
Postage		$10,000		$10,000		$10,000		$10,000		$10,000		$10,000
Printing & Advertsg		$25,000		$25,000		$25,000		$25,000		$25,000		$25,000
Subtotal	11.0	$867,936	11.0	$755,083	11.0	$753,337	11.0	$757,754	11.0	$773,391	11.0	$800,311

MAGNET PERSONNEL SUPPORT

Director	1.0	$63,296	1.0	$66,461	1.0	$69,784	1.0	$73,273	1.0	$76,937	1.0	$80,784
Personnel Spec	2.0	$93,266	2.0	$97,929	2.0	$102,826	2.0	$107,967	2.0	$113,365	2.0	$119,034
Clerical	2.0	$37,200	2.0	$39,060	2.0	$41,013	2.0	$43,064	2.0	$45,217	2.0	$47,478
Travel & Recruitment		$40,000		$40,000		$40,000		$40,000		$40,000		$40,000
Workshops		$20,000		$20,000		$30,000		$30,000		$20,000		$20,000
Staff Stipends		$100,000		$100,000		$150,000		$150,000		$100,000		$100,000
Contracted Services		$30,000		$30,000		$45,000		$45,000		$30,000		$30,000
Postage		$5,000		$5,000		$5,000		$5,000		$5,000		$5,000
College Stipends		$200,000		$400,000		$400,000		$300,000		$200,000		$200,000
Supplies & Materials		$15,000		$15,000		$10,000		$10,000		$10,000		$10,000
Printing & Advertsg		$75,000		$50,000		$50,000		$50,000		$40,000		$30,000
Equipment		$50,000		$25,000		$10,000		$10,000		$5,000		$5,000
Mileage		$4,000		$4,000		$4,000		$4,000		$4,000		$4,000
Subtotal	5.0	$732,762	5.0	$892,450	5.0	$957,623	5.0	$868,304	5.0	$689,519	5.0	$691,295

MAGNET TRANSPORTATION SUPPORT

Transportation Spec	1.0	$46,633	1.0	$48,965	1.0	$51,413	1.0	$53,984	1.0	$56,683	1.0	$59,517
Program Analyst	1.0	$34,445	1.0	$36,167	1.0	$37,976	1.0	$39,874	1.0	$41,868	1.0	$43,962
Clerical	1.0	$18,600	1.0	$19,530	1.0	$20,507	1.0	$21,532	1.0	$22,608	1.0	$23,739
Equipment		$35,000		$10,000		$10,000		$5,000		$5,000		$5,000
Supplies & Material		$10,000		$10,000		$10,000		$10,000		$10,000		$10,000
Mileage		$5,000		$5,000		$5,000		$5,000		$5,000		$5,000
Contracted Services		$75,000		$75,000		$75,000		$75,000		$75,000		$75,000
Subtotal	3.0	$224,678	3.0	$204,662	3.0	$209,895	3.0	$210,390	3.0	$216,159	3.0	$222,218

MAGNET EVALUATION SUPPORT

Evaluation Spec	2.0	$87,382	2.0	$91,751	3.0	$144,508	3.0	$151,733	4.0	$212,427	4.0	$223,048
Evaluation Aides	2.0	$32,888	2.0	$34,532	3.0	$54,389	3.0	$57,108	3.0	$59,963	3.0	$62,962
Clerical	2.0	$37,200	2.0	$39,060	2.0	$41,013	2.0	$43,064	2.0	$45,217	2.0	$47,478
Supplies & Materials		$5,000		$10,000		$15,000		$20,000		$25,000		$25,000
Mileage		$1,000		$2,000		$3,000		$4,000		$5,000		$5,000
Equipment		$24,000		$12,000		$2,000		$2,000		$2,000		$2,000
Contracted Services		$25,000		$30,000		$36,000		$38,000		$40,000		$40,000
Subtotal	6.0	$212,470	6.0	$219,344	8.0	$295,910	8.0	$315,905	9.0	$389,607	9.0	$405,488

MAGNET RECRUITMENT & PUBLIC INFORMATION

Director	1.0	$64,821	1.0	$68,062	1.0	$71,465	1.0	$75,038	1.0	$78,790	1.0	$82,730
Public Rel'ns Spec	1.0	$46,633	1.0	$48,965	1.0	$51,413	1.0	$53,984	1.0	$56,683	1.0	$59,517
Placement Advisors	1.0	$34,445	2.0	$72,335	3.0	$108,502	3.0	$113,927	3.0	$119,623	3.0	$125,604
Writers	2.0	$58,798	2.0	$61,738	3.0	$97,237	3.0	$102,099	3.0	$107,204	3.0	$112,564
Graphic Artist	1.0	$29,399	1.0	$30,869	1.0	$32,412	1.0	$34,033	1.0	$35,735	1.0	$37,521
Placement Aides	1.0	$9,969	4.0	$41,870	6.0	$65,945	6.0	$69,242	6.0	$72,704	6.0	$76,340
Clerical	3.0	$55,800	3.0	$58,590	3.0	$61,520	3.0	$64,595	3.0	$67,825	3.0	$71,217
School Based Recruiters	5.0	$172,925	9.0	$326,828	10.0	$381,300	12.0	$480,438	12.0	$504,459	12.0	$529,682
Equipment		$175,000		$75,000		$75,000		$75,000		$50,000		$50,000
Supplies & Material		$50,000		$50,000		$40,000		$40,000		$40,000		$40,000
Printing & Advertsg		$75,000		$100,000		$125,000		$125,000		$100,000		$100,000
Postage		$75,000		$75,000		$75,000		$75,000		$75,000		$75,000
Mileage		$15,000		$15,000		$15,000		$15,000		$15,000		$15,000
Travel		$15,000		$15,000		$15,000		$15,000		$15,000		$15,000
Contracted Services		$40,000		$50,000		$60,000		$70,000		$80,000		$80,000
Telephone		$10,000		$10,000		$10,000		$10,000		$10,000		$10,000
Subtotal	15.0	$927,790	23.0	$1,099,256	28.0	$1,284,793	30.0	$1,418,356	30.0	$1,428,024	30.0	$1,480,175

OTHER CENTRAL SERVICES												
Budget Specialist	1.0	$46.633	1.0	$48,965	1.0	$51,413	1.0	$53,984	1.0	$56,683	1.0	$59,517
Procurement Specialist	1.0	$46,633	1.0	$48,965	1.0	$51,413	1.0	$53,984	1.0	$56,683	1.0	$59,517
Budget Clerk	1.0	$18,600	1.0	$19,530	1.0	$20,507	1.0	$21,532	1.0	$22,608	1.0	$23,739
Payroll Clerk	2.0	$37,200	2.0	$39,060	2.0	$41,013	2.0	$43,064	2.0	$45,217	2.0	$45,217
Supplies & Material		$3,000		$3,000		$3,000		$3,000		$3,000		$3,000
Equipment		$10,000		$5,000		$5,000		$5,000		$5,000		$5,000
Mileage		$1,000		$1,000		$1,000		$1,000		$1,000		$1,000
Postage		$1,000		$1,000		$1,000		$1,000		$1,000		$1,000
Subtotal	5.0	$164,066	5.0	$166,519	5.0	$174,345	5.0	$182,563	5.0	$191,191	5.0	$197,990
PILOT PROJECT FOR SEVERELY HANDICAPPED												
Project Coordinator					0.25	$12,000	0.25	$12,600	0.25	$13,230	0.25	$13,892
Spec Ed Curric Coord					0.25	$11,000	0.25	$11,550	0.25	$12,128	0.25	$12,734
Teachers					3.00	$103,806	3.00	$108,996	5.00	$190,745	5.00	$200,280
Sub Teachers						$5,000		$5,250		$6,000		$6,300
Supportive Services						$10,000		$10,500		$10,750		$11,338
Supplies & Materials						$1,000		$1,050		$1,500		$1,575
Field Trips						$600		$630		$900		$945
Subtotal					3.50	$143,406	3.50	$150,576	5.50	$235,253	5.50	$247,064
Total	45.0	$3,'29,702	53.0	$3,337,314	63.5	$3,819,309	65.5	$3,903,847	68.5	$3,923,144	68.5	$4,044,539

HIGH SCHOOL BUDGETS 29-Jul-86

SCHEDULE OF RATES

Teachers	$31,385	Av. Salary Increase	105%
Curriculum Coordinators	$39,494	Computers	$3,500
Clerical	$18,314		
Principal	$61,734		
Transition Staff	$37,020		
Program Administrator	$45,555		

ADVANCED VOCATIONAL AND TECHNICAL STUDIES	FTE	1986-87	FTE	1987-88 Planning first year	FTE	1988-89 Planning second year	FTE	1989-90 Year 1 Implementation	FTE	1990-91 Year 2 Implementation	FTE	1991-92 Year 3 Implementation
Planning Task Force expenses			0.0	$60,000	0.0	$60,000	0.0	$0	0.0	$0	0.0	$0
Principal			1.0	$64,821	1.0	$68,062						
Program Administrator			1.0	$47,833	1.0	$50,224	1.0	$52,736	1.0	$55,372	1.0	$58,141
Curriculum Coordinator			1.0	$41,469	1.0	$43,542	1.0	$45,719	1.0	$48,005	1.0	$50,405
Voc/Tech Specialist			0.0	$0	1.0	$51,413	1.0	$53,984	1.0	$56,683	1.0	$59,517
Resource Teacher(s)			0.0	$0	0.0	$0	4.0	$145,328	7.0	$267,041	7.0	$280,393
Transition Teachers			0.0	$0	0.0	$0	5.0	$214,276	5.0	$224,990	5.0	$236,240
Clerical			1.0	$19,230	1.0	$20,191	1.0	$21,201	1.0	$22,261	1.0	$23,374

Supplies & Materials		$10,000		$50,000		$200,000		$200,000		$200,000		
Equipment		$0		$2,500,000		$1,500,000		$1,000,000		$1,000,000		
Printing & Advertising		$1,000		$40,000		$40,000		$40,000		$40,000		
Textbooks		$0		$100,000		$75,000		$50,000		$50,000		
Consultant Services		$20,000		$30,000		$30,000		$25,000		$25,000		
Curriculum Dev./ Inservice		$0		$75,000		$60,000		$50,000		$50,000		
Library Books		$0		$75,000		$75,000		$60,000		$40,000		
Field Trips/ Internships		$5,000		$5,000		$40,000		$40,000		$40,000		
TOTAL	4.0	$269,352	5.0	$3,168,432	13.0	$2,553,244	16.0	$2,139,352	16.0	$2,153,070		

NORTHEAST LAW & PUBLIC SERVICE	FTE	1986-87 Planning first year	FTE	1987-88 Year 1 Implementation	FTE	1988-89 Year 2 Implementation	FTE	1989-90 Year 3 Implementation	FTE	1990-91 Year 4 Implementation	FTE	1991-92 Year 5 Implementation
Planning Task Force expenses	0.0	$75,000	0.0	$0	0.0	$0	0.0	$00.0	0.0	$0	0.0	$0
Principal	1.0	$61,734										
Program Administrator	1.0	$45,555	1.0	$47,833	1.0	$50,224	1.0	$52,736	1.0	$55,372	1.0	$58,141
Curriculum Coord.	1.0	$39,494	1.0	$41,469	1.0	$43,542	1.0	$45,719	1.0	$48,005	1.0	$50,405
Transition Staff	0.0	$0	3.0	$116,613	3.0	$122,444	3.0	$128,566	3.0	$134,994	3.0	$141,744
Resource Teacher(s)	0.0	$0	10.0	$329,543	10.0	$346,020	10.0	$363,321	10.0	$381,487	10.0	$400,561
Clerical	1.0	$18,314	1.0	$19,230	1.0	$20,191	1.0	$21,201	1.0	$22,261	1.0	$23,374
Supplies & Materials		$25,000		$25,000		$25,000		$25,000		$25,000		$25,000
Equipment		$200,000		$75,000		$50,000		$50,000		$30,000		$30,000
Printing & Advertising		$5,000		$10,000		$10,000		$10,000		$10,000		$10,000
Textbooks		$75,000		$30,000		$20,000		$20,000		$20,000		$20,000
Consultant Services		$5,000		$30,000		$30,000		$30,000		$30,000		$30,000
Curriculum Dev./ Inservice		$50,000		$50,000		$40,000		$30,000		$30,000		$25,000
Library Books		$75,000		$50,000		$30,000		$30,000		$30,000		$30,000
Field Trips/ Travel		$5,000		$15,000		$15,000		$15,000		$15,000		$15,000
TOTAL	4	$680,097	16.0	$839,687	16.0	$802,421	16.0	$821,542	16.0	$832,119	16.0	$859,225

PASEO VISUAL & PERFORMING ARTS		Planning first year		Year 1 Implementation		Year 2 Implementation		Year 3 Implementation
Planning Task Force expenses	0.0	$75,000	0.0	$0	0.0	$0	0.0	$0
Principal	1.0	$68,062						
Program Administrator	1.0	$50,224	1.0	$52,736	1.0	$55,372	1.0	$58,141
Curriculum Coord.	1.0	$43,542	1.0	$45,719	1.0	$48,005	1.0	$50,405
Trainer	0.0		1.0	$36,332	1.0	$38,149	1.0	$40,056
Transition Staff	0.0	$0	2.0	$85,711	3.0	$134,994	5.0	$236,240
Resource Teacher(s)	0.0	$0	4.0	$145,328	6.0	$228,892	8.0	$320,449
Clerical	1.0	$20,191	1.0	$21,201	1.0	$22,261	1.0	$23,374
Supplies & Materials		$50,000		$60,000		$50,000		$50,000
Equipment		$500,000		$300,000		$200,000		$100,000
Printing & Advertising		$5,000		$25,000		$25,000		$25,000
Textbooks		$50,000		$40,000		$40,000		$30,000
Consultant Services		$10,000		$60,000		$60,000		$70,000
Curriculum Dev. / Inservice		$30,000		$30,000		$30,000		$30,000
Library Books		$50,000		$50,000		$30,000		$20,000
Field Trips/ Travel		$5,000		$15,000		$15,000		$15,000
TOTAL	4.0	$957,019	10.0	$967,026	13.0	$977,673	17.0	$1,068,665

WESTPORT BUSINESS		Planning first year		Year 1 Implementation		Year 2 Implementation
Planning Task Force expenses	0.0	$75,000	0.0	$0	0.0	$0
Principal	1.0	$71,465				
Program Administrator	1.0	$52,736	1.0	$55,372	1.0	$58,141
Curriculum Coord.	1.0	$45,719	1.0	$48,005	1.0	$50,405
Transition Staff	0.0	$0	3.0	$134,994	3.0	$141,747
Resource Teacher(s)	0.0	$0	5.0	$190,743	5.0	$200,280
Clerical	1.0	$21,201	1.0	$22,261	1.0	$23,374
Supplies & Materials		$40,000		$40,000		$40,000
Equipment		$500,000		$200,000		$100,000
Printing & Advertising		$5,000		$15,000		$15,000
Textbooks		$50,000		$30,000		$20,000
Consultant Services		$15,000		$30,000		$30,000
Curriculum Dev./ Inservice		$50,000		$40,000		$30,000
Library Books		$40,000		$30,000		$20,000
Field Trips/Travel		$5,000		$15,000		$15,000
TOTAL	4.0	$971,120	11.0	$851,376	11.0	$743,948

WESTPORT COMMUNICATIONS

	Planning first year		Year 1 Implementation
Planning Task Force expenses	0.0 $75,000	0.0	$0
Program Administrator	1.0 $55,372	1.0	$58,141
Curriculum Coord.	1.0 $48,005	1.0	$50,405
Transition Staff	0.0 $0	2.0	$95,496
Resource Teacher(s)	0.0 $0	5.0	$200,280
Clerical	1.0 $22,261	1.0	$23,374
Supplies & Materials	$75,000		$100,000
Equipment	$500,000		$250,000
Printing & Advertising	$5,000		$25,000
Textbooks	$40,000		$20,000
Consultant Services	$15,000		$15,000
Curriculum Dev./ Inservice	$50,000		$40,000
Library Books	$50,000		$30,000
Field Trips/Travel	$5,000		$20,000
TOTAL	3.0 $940,638	10.0	$926,697

SOUTHEAST INTERNATIONAL STUDIES

	Planning first year		Year 1 Implementation
Planning Task Force expenses	0.0 $75,000	0.0	$0
Program Administrator	1.0 $55,372	1.0	$58,141
Curriculum Coord.	1.0 $48,005	1.0	$50,405
Transition Staff	0.0 $0	2.0	$94,496
Resource Teacher(s)	0.0 $0	5.0	$200,280
Clerical	1.0 $22,261	1.0	$23,374
Supplies & Materials	$40,000		$40,000
Equipment	$200,000		$100,000
Printing & Advertising	$10,000		$15,000
Textbooks	$100,000		$100,000
Consultant Services	$20,000		$30,000
Curriculum Dev./ Inservice	$50,000		$40,000
Library Books	$75,000		$75,000
Field Trips/Travel	$5,000		$40,000
TOTAL	3.0 $700,638	10.0	$866,697

SCHEDULE OF RATES

Teachers	$31,385	Av. Salary Increase	105%
Curriculum Coordinators	$39,494		
Clerical	$18,314		
Principal	$61,734		
Program Administrator	$45,555		
Principal	$61,734		

	FTE 1986-87	FTE 1987-88	FTE 1988-89	FTE 1989-90	FTE 1990-91	FTE 1991-92
NORTHEAST ROTC MAGNET			Planning	Implementation	Implementation	Implementation
Planning Task Force expenses		0.0	$75,000	0.0 $0	0.0 $0	0.0 $0
Program Administrator		1.0	$50,224	1.0 $52,736	1.0 $55,373	1.0 $58,141
Curriculum Coord.		1.0	$43,542	1.0 $45,719	1.0 $48,005	1.0 $50,405
Military Liaison		1.0	$34,033	1.0 $35,735	1.0 $37,521	1.0 $39,397
Resource Teacher(s)		0.0	$0	4.0 $145,328	5.0 $190,743	5.0 $200,280
Transition Teachers		0.0	$0	2.0 $85,712	2.0 $89,998	2.0 $94,498
Clerical		1.0	$20,191	1.0 $21,201	1.0 $22,261	1.0 $23,374
Supplies & Materials			$20,000	$15,000	$10,000	$10,000
Equipment			$200,000	$100,000	$75,000	$50,000
Printing & Advertising			$5,000	$10,000	$10,000	$10,000
Textbooks			$0	$10,000	$10,000	$8,000
Consultant Services			$2,500	$2,500	$2,500	$2,500
Curriculum Dev./ Inservice			$40,000	$40,000	$30,000	$25,000
Library Books			$0	$15,000	$12,000	$10,000
Field Trips			$0	$120,000	$120,000	$160,000
TOTAL		4.0	$490,491	10.0 $698,930	11.0 $713,401	11.0 $741,596

EAST HIGH SCHOOL -
AGRIBUSINESS MAGNET

Planning Task Force expenses	0.0	$75,000	0.0	$0
Program Administrator	1.0	$55,372	1.0	$58,141
Farm Manager	1.0	$37,521	1.0	$39,397
Ass't Manager	1.0	$32,412	1.0	$34,033
Curriculum Coord.	1.0	$48,005	1.0	$50,405
Resource Teacher(s)	0.0	$0	5.0	$200,280
Transition Staff	0.0	$0	3.0	$141,747
Clerical	1.0	$22,261	1.0	$23,374
Work/Study Coordinator	1.0	$48,005	1.0	$50,405
Supplies & Materials		$40,000		$30,000
Equipment		$500,000		$300,000
Livestock & Feed		$200,000		$200,000
Printing & Advertising		$5,000		$10,000
Textbooks		$0		$8,000
Consultant Services		$5,000		$30,000
Curriculum Dev./ Inservice		$50,000		$50,000
Library Books		$0		$20,000
Field Trips		$5,000		$10,000
TOTAL	6.0	$1,123,577	14.0	$1,234,204

CENTRAL -
COMPUTERS
UNLIMITED

	Planning		Year 1 Implementation		Year 2 Implementation		Year 3 Implementation		Year 4 Implementation
Planning Task Force expenses		$75,000	0.0	$0	0.0	$0	0.0	$0	0.0	$0
Principal	1.0	$64,821								
Program Administrator	1.0	$47,833	1.0	$50,224	1.0	$52,736	1.0	$55,372	1.0	$58,141
Curriculum Coord.	1.0	$41,469	1.0	$43,542	1.0	$45,719	1.0	$48,005	1.0	$50,405
Resource Teacher(s)	0.0	$0	5.0	$173,010	5.0	$181,660	5.0	$190,743	5.0	$200,280
Transition Staff	0.0	$0	3.0	$122,445	3.0	$128,568	3.0	$134,997	3.0	$141,747
Clerical	1.0	$19,230	1.0	$20,191	1.0	$21,201	1.0	$22,261	1.0	$23,374
Supplies & Materials		$40,000		$40,000		$40,000		$40,000		$40,000
Equipment		$500,000		$250,000		$200,000		$150,000		$100,000
Printing & Advertising		$5,000		$10,000		$10,000		$10,000		$10,000
Textbooks		$20,000		$35,000		$20,000		$20,000		$20,000
Consultant Services		$15,000		$35,000		$35,000		$35,000		$40,000
Curriculum Dev./ Inservice		$50,000		$75,000		$60,000		$50,000		$50,000
Library Books		$0		$30,000		$20,000		$20,000		$10,000
Field Trips		$5,000		$2,500		$5,000		$5,000		$5,000
TOTAL	4	$883,352	11	$868,273	11	$800,312	11	$760,828	11	$727,369

VAN HORN ENGINEERING

	Planning		Year 1 Implementation		Year 2 Implementation
Planning Task Force expenses					
Principal	0.0 $75,000	0.0	$0	0.0	$0
Program Administrator	1.0 $71,465				
Cirriculum Coord.	1.0 $52,736	1.0	$55,372	1.0	$58,141
Res. Tchr./ Liaison	1.0 $45,719	1.0	$48,005	1.0	$50,405
Clerical	0.0 $0	12.0	$457,783	12.0	$480,672
	1.0 $21,201	1.0	$22,261	1.0	$23,374
Supplies & Materials	$50,000		$50,000		$50,000
Equipment	$750,000		$500,000		$300,000
Printing & Advertising	$10,000		$10,000		$10,000
Textbooks	$0		$35,000		$25,000
Consultant Services	$4,000		$30,000		$50,000
Curriculum Dev./Inservice	$60,000		$75,000		$75,000
Library Books	$0		$20,000		$20,000
Field Trips	$5,000		$15,000		$15,000
TOTAL	4.0 $1,145,120	20.0	$1,563,416	20	$1,393,837

EAST - ENVIRONMENTAL SCIENCE MAGNET

	Planning		Year 1 Implementation		Year 2 Implementation
Planning Task Force expenses					
Principal	0.0 $75,000	0.0	$0	0.0	$0
Program Administrator	1.0 $71,465				
Curriculum Coord.	1.0 $52,736	1.0	$[illegible],372	1.0	$58,141
Resource Teacher(s)	1.0 $45,719	1.0	$48,005	1.0	$50,405
Transition Staff	0.0 $0	5.0	$190,743	5.0	$200,280
Clerical	0.0 $0	2.0	$89,998	2.0	$94,498
	1.0 $21,201	1.0	$22,261	1.0	$23,374
Supplies & Materials	$2,500		$25,000		$25,000
Equipment	$500,000		$400,000		$200,000
Printing & Advertising	$15,000		$15,000		$15,000
Textbooks	$40,000		$40,000		$40,000
Consultant Services	$5,000		$30,000		$30,000
Curriculum Dev./ Inservice	$50,000		$50,000		$40,000
Library Books	$30,000		$30,000		$30,000
Field Trips/ Travel	$5,000		$100,000		$100,000
TOTAL	4.0 $913,620	10.0	$1,096,380	10.0	$906,699

HIGH SCHOOL MAGNET BUDGETS 29-Jul-86

CENTRAL HIGH SCHOOL - CLASSICAL GREEK MAGNET

	Planning		
Planning Task Force expenses	0.0	$75,000	0.0	$0
Program Administrator	1.0	$55,372	1.0	$58,141
Curriculum Coord.	1.0	$48,005	1.0	$50,405
Resource Teacher(s)	0.0	$0	5.0	$200,280
Trainer	0.0	$0	1.0	$40.056
Transition Staff	0.0	$0	2.0	$94.498
Clerical	1.0	$22,261	1.0	$23,374
Supplies & Materials		$50,000		$50,000
Equipment		$200,000		$150,000
Printing & Advertising		$20,000		$15,000
Textbooks		$60,000		$40,000
Visiting athlete-scholars				$40,000
Curriculum Dev./ Inservice		$50,000		$50,000
Library Books		$25,000		$25,000
Field Trips/ Travel		$5,000		$50,000
TOTAL	3.0	$610,638	11.0	$886,755

SOUTHWEST - SCIENCE/MATH MAGNET

	Planning		Year 1 Implementation		Year 2 Implementation		Year 3 Implementation		Year 4 Implementation
Planning Task Force expenses	0.0	$75,000	0.0	$0	0.0	$0	0.0	$0	0.0	$0
Principal	1.0	$64,821								
Program Administrator	1.0	$47,833	1.0	$50,224	1.0	$52,736	1.0	$55,372	1.0	$58,141
Cirriculum Coord.	1.0	$41,469	1.0	$43,542	1.0	$45,719	1.0	$48,005	1.0	$50,405
Clerical	1.0	$19,230	1.0	$20,191	1.0	$21,201	1.0	$22,261	1.0	$23,374
Resource Teachers	0.0	$0	5.0	$173,010	5.0	$181,660	5.0	$190,743	5.0	$200,280
Transition Staff		$0	2.0	$81,630	3.0	$128,568	3.0	$134,997	5.0	$236,245
Supplies & Materials		$40,000		$40,000		$40,000		$40,000		$40,000
Equipment		$750,000		$600,000		$500,000		$300,000		$250,000
Printing & Advertising		$10,000		$15,000		$15,000		$10,000		$10,000
Textbooks		$50,000		$40,000		$40,000		$40,000		$40,000
Consultant Services		$5,000		$30,000		$30,000		$30,000		$30,000
Curriculum Dev./ Inservice		$50,000		$50,000		$50,000		$40,000		$30,000
Library Books		$40,000		$35,000		$30,000		$25,000		$25,000
Field Trips/ Travel		$5,000		$15,000		$15,000		$15,000		$15,000
Library Books		$35,000		$35,000		$30,000		$20,000		$20,000
TOTAL	4.0	$1,198,352	10.0	$1,193,598	11.0	$1,149,884	11.0	$951,379	13	$1,008,446

HIGH SCHOOL BUDGETS 29-Jul-86

	FTE	1986-87	FTE	1987-88	FTE	1988-89	FTE	1989-90	FTE	1990-91	FTE	1991-92
SOUTHEAST - HEALTH PROFESSIONS								Planning		Year 1 Implementation		Year 2 Implementation
Planning Task Force expenses							0.0	$75,000	0.0	$0	0.0	$0
Principal							1.0	$71,465				
Program Administrator							1.0	$52,736	1.0	$55,373	1.0	$58,141
Curriculum Coord.							1.0	$45,719	1.0	$48,005	1.0	$50,405
Health Res. Tchrs.							0.0	$0	5.0	$190,745	5.0	$200,282
Transition Staff							0.0	$0	3.0	$134,997	3.0	$141,747
Clerical							1.0	$21,201	1.0	$22,261	1.0	$23,374
Supplies & Materials								$75,000		$90,000		$90,000
Equipment								$500,000		$250,000		$150,000
Printing & Advertising								$15,000		$25,000		$25,000
Textbooks								$75,000		$50,000		$40,000
Consultant Services								$20,000		$20,000		$20,000
Curriculum Dev./ Inservice								$50,000		$40,000		$40,000
Library Books								$75,000		$75,000		$50,000
Field Trips/ Travel								$5,000		$15,000		$15,000
TOTAL							4.0	$1,081,121	11	$1,016,381	11	$903,950

SCHEDULE OF RATES

MIDDLE SCHOOL BUDGETS 29-Jul-86

Teachers	$31,385	Average Salary Increase	105.0%
Curriculum Coord.	$39,494	Ext. Day % Salaries	20%
Program Administrators	$45,555	Computers (W/Software	$3,500
Clerical	$18,314		
Transition Staff	$37,020		
Principal	$61,734		

	FTE	1986-87	FTE	1987-88	FTE	1988-89	FTE	1989-90	FTE	1990-91	FTE	1991-92
MIDDLE SCHOOL PROGRAMS												
PLANNING												
Site Task Forces @ $40,000	5	$200,000	1	$40,000	2	$80,000	2	$80,000	0	$0	0	$0
Clerical	6	$109,884	2	$38,459	3	$60,574	3	$63,602	1	$22,261	1	$23,374
Supplies & Materials		$5,000		$5,000		$5,000		$5,000		$5,000		$5,000
Printing & Advertising @ $15,000	5	$75,000	1	$15,000	2	$30,000	2	$30,000	0	$0	0	$0
Inservice @ $30,000	5	$150,000	1	$30,000	2	$60,000	2	$60,000	0	$0	0	$0
SUB TOTAL	6	$539,884	2	$128,459	3	$235,574	3	$238,602	1	$27,261	1	$28,374

BINGHAM SCIENCE

Principal	1	$61,734										
Resource Tchrs.			8	$263,634	8	$276,816	8	$290,656	8	$305,189	8	$320,449
Transition Staff			4	$155,484	4	$163,260	4	$171,424	4	$179,996	4	$188,996
Curriculum coord.	1	$39,494	1	$41,469	1	$43,542	1	$45,719	1	$48,005	1	$50,405
Trav/Field Trips		$5,000		$5,000		$5,000		$5,000		$5,000		$5,000
Textbooks		$40,000		$20,000		$15,000		$10,000		$10,000		$10,000
Computers	100	$350,000	75	$262,500	60	$210,000	40	$140,000	25	$87,500	25	$87,500
Inservice/ Staff Dev.				$30,000		$30,000		$30,000		$30,000		$30,000
Materials & Supplies		$40,000		$0,000		$40,000		$40,000		$40,000		$40,000
Equipment		$100,000		$100,000		$80,000		$60,000		$40,000		$40,000
Printing & Advertising				$7,5000		$7,5000		$7,500		$7,500		$7,500
SUB TOTAL	2	$636,338	13	$925,587	13	$871,118	13	$800,300	13	$753,191	13	$779,850

LINCOLN SOUTH SCIENCE

Principal	1	$61,734										
Resource Tchrs.			8	$263,634	8	$276,816	8	$290,656	8	$306,189	8	$320,449
Transition Staff			4	$155,484	4	$163,260	4	$171,424	4	$179,996	4	$188,996
Curriculum Coord.	1	$39,494	1	$41,469	1	$43,542	1	$45,719	1	$48,005	1	$50,405
Trav/Field Trips		$5,000		$5,000		$5,000		$5,000		$5,000		$5,000
Textbooks		$40,000		$20,000		$15,000		$10,000		$10,000		$10,000
Computers	100	$350,000	75	$262,500	60	$210,000	40	$140,000	25	$87,500	25	$87,500
Inservice/ Staff Dev.				$30,000		$30,000		$30,000		$30,000		$30,000
Materials & Supplies		$40,000		$40,000		$40,000		$40,000		$40,000		$40,000
Equipment		$100,000		$100,000		$80,000		$60,000		$40,000		$40,000
Printing & Advertising				$7,500		$7,500		$7,500		$7,500		$7,500
SUB TOTAL	2	$636,228	13	$925,587	13	$871,118	13	$800,300	13	$753,191	13	$779,850

CENTRAL COMPUTERS

Principal	1	$61,734									
Program Administrator	1	$45,555	1	$47,833	1	$50,224	1	$52,736	1	$55,372	1	$58,141
Resource Tchrs.			4	$131,817	4	$138,408	4	$145,328	4	$152,595	4	$160,224
Transition Staff			2	$77,742	2	$81,630	2	$85,712	2	$89,998	2	$94,498
Curriculum Coord.	1	$39,494	1	$41,469	1	$43,542	1	$45,719	1	$48,005	1	$50,405
Trav/Field Trips		$5,000		$5,000		$5,000		$5,000		$5,000		$5,000
Textbooks		$40,000		$20,000		$15,000		$10,000		$10,000		$10,000
Computers	150	$525,000	100	$350,000	75	$262,500	50	$175,000	50	$175,000	50	$175,000
Inservice/ Staff Dev.				$30,000		$30,000		$30,000		$30,000		$30,000
Materials & Supplies		$40,000		$40,000		$40,000		$40,000		$40,000		$40,000
Equipment		$100,000		$100,000		$80,000		$60,000		$40,000		$40,000
Printing & Advertising				$7,5000		$7,5000		$7,500		$7,500		$7,500
SUB TOTAL	3	$856,783	8	$803,528	8	$703,580	8	$604,259	8	$598,098	8	$612,628

NEW PASEO MIDDLE PERFORMING ARTS

Principal	1	$61,734									
Resource Tchrs.			8	$263,634	8	$276,816	8	$290,656	8	$305,189	8	$320,449
Trainer			1	$32,954	1	$34,602	1	$36,332	1	$38,149	1	$40,056
Transition Staff			4	$155,484	4	$163,260	4	$171,424	4	$179,996	4	$188,996
Curriculum Coord.	1	$39,494	1	$41,469	1	$43,542	1	$45,719	1	$48,005	1	$50,405
Travel/Field Trips		$5,000		$5,000		$5,000		$5,000		$5,000		$5,000
Inservice/ Staff Dev.				$30,000		$30,000		$30,000		$30,000		$30,000
Textbooks		$40,000		$10,000		$10,000		$10,000		$10,000		
Materials & Supplies		$40,000		$40,000		$40,000		$40,000		$40,000		$35,000
Equipment		$150,000		$75,000		$75,000		$60,000		$50,000		$40,000
Printing & Advertising				$7,500		$7,500		$7,500		$7,500		$7,500
SUB TOTAL	2	$336,228	13	$661,041	13	$685,720	13	$696,632	13	$713,839	13	$727,406

SOUTHEAST SCIENCE MATH												
Principal	1	$61,734										
Resource Tchrs.			8	$263,634	8	$276,816	8	$290,656	8	$305,189	8	$320,449
Transition Staff			4	$155,484	4	$163,260	4	$171,424	4	$179,996	4	$188,996
Curriculum Coord.	1	$39,494	1	$41,469	1	$43,542	1	$45,719	1	$48,005	1	$50,405
Trav/Field Trips		$5,000		$5,000		$5,000		$5,000		$5,000		$5,000
Textbooks		$40,000		$20,000		$20,000		$15,000		$10,000		$10,000
Computers	100	$350,000	75	$262,500	75	$262,500	60	$210,000	40	$140,000	25	$87,500
Inservice/ Staff Dev.				$30,000		$30,000		$30,000		$30,000		$30,000
Materials & Supplies		$40,000		$40,000		$40,000		$40,000		$40,000		$40,000
Equipment		$100,000		$100,000		$100,000		$80,000		$60,000		$40,000
Printing & Advertising				$7,500		$7,500		$7,500		$7,500		$7,500
SUB TOTAL	2	$636,228	13	$925,587	13	$948,618	13	$895,300	13	$825,691	13	$779,850

CENTRAL LANGUAGE										
Program Administrator	1	$47,833	1	$50,224	1	$52,736	1	$55,372	1	$58,141
Resource Tchrs.			4	$138,408	4	$145,328	4	$152,595	4	$160,224
Transition Staff			2	$81,630	2	$85,712	2	$89,998	2	$94,498
Curriculum Coord.			1	$43,542	1	$45,719	1	$48,005	1	$50,405
Travel/Field Trips		$5,000		$5,000		$5,000		$5,000		$5,000
Textbooks				$10,000		$10,000		$10,000		$10,000
Inservice/Staff Dev.				$30,000		$30,000		$30,000		$30,000
Materials and Supplies		$40,000		$25,000		$25,000		$25,000		$25,000
Equipment		$150,000		$100,000		$50,000		$40,000		$25,000
Printing & Advertising				$7,500		$7,500		$7,500		$7,500
SUB TOTAL	1	$242,833	8	$491,304	8	$456,995	8	$463,470	8	$465,769

KING LATIN MIDDLE								
Principal	1	$68,062	0	$0	0	$0	0	$0
Resource Tchrs.			8	$290,656	8	$305,189	8	$320,449
Transition Staff			4	$171,424	4	$179,996	4	$188,996
Curriculum Coord.	1	$43,542	1	$45,719	1	$48,005	1	$50,405
Travel/Field Trips		$5,000		$5,000		$5,000		$5,000
Textbooks		$40,000		$30,000		$30,000		$20,000
Inservice/Staff Dev.		$30,000		$30,000		$25,000		$25,000
Uniforms		$70,000		$60,000		$50,000		$50,000
Materials & Supplies		$40,000		$25,000		$25,000		$25,000
Equipment		$75,000		$50,000		$40,000		$30,000
Computers	50	$175,000	50	$175,000	30	$105,00	15	$52,500
Printing & Advertising				$7,500		$7,500		$7,500
SUB TOTAL	2	$546,604	13	$890,300	13	$820,691	13	$774,850

NOWLIN ENVIRONMENTAL SCIENCE								
Principal	1	$68,062						
Resource Tchrs.			8	$290,656	8	$305,189	8	$320,449
Transition Staff			4	$171,424	4	$179,996	4	$188,996
Curriculum Coord.	1	$43,542	1	$45,719	1	$48,005	1	$50,405
Travel/Field Trips		$100,000		$100,000		$100,000		$100,000
Inservice/Staff Dev.						$30,000		$25,000
Computers	30	$105,000	30	$105,000	25	$87,500	15	$52,500
Materials & Supplies		$2,000		$40,000		$30,000		$25,000
Equipment		$100,000		$80,000		$60,000		$40,000
Printing & Advertising				$7,500		$7,500		$7,500
SUB TOTAL	2	$468,604	13	$885,300	13	$858,191	13	$819,850

WESTPORT COMMUNICATIONS												
Principal							1	$71,465	0	$0	0	$0
Resource Tchrs.									8	$305,189	8	$320,449
Transition Staff									4	$179,996	4	$188,996
Curriculum Coord.							1	$45,719	1	$48,005	1	$50,405
Travel/Field Trips								$5,000		$5,000		$5,000
Inservice/Staff Dev.										$30,000		$30,000
Textbooks								$60,000		$40,000		$25,000
Materials & Supplies								$40,000		$25,000		$25,000
Equipment								$200,000		$200,000		$100,000
Computers							30	$105,000	30	$105,000	25	$87,500
Printing & Advertising										$7,500		$7,500
SUB TOTAL							2	$527,184	13	$945,691	13	$839,850

NORTHEAST CLASSICAL GREEK												
Principal							1	$71,465	0	$0	0	$0
Resource Tchrs.									8	$305,189	8	$320,449
Trainer									1	$38,149	1	$40,056
Transition Staff									4	$179,996	4	$188,996
Curriculum Coord.							1	$45,719	1	$48,005	1	$50,405
Travel/Field Trips								$5,000		$5,000		$5,000
Textbooks								$40,000		$30,000		$20,000
Inservice/Staff Dev.								$30,000		$30,000		$25,000
Materials & Supplies								$40,000		$25,000		$25,000
Equipment								$250,000		$150,000		$100,000
Computers							30	$105,000	30	$105,000	25	$87,500
Printing & Advertising										$7,500		$7,500
SUB TOTAL							2	$587,184	14	$923,839	14	$869,906
TOTAL MIDDLE SCHOOL	17	$3,641,579	63	$4,612,621	75	$5,822,239	101	$7,382,356	122	$7,683,150	122	$7,478,185

ELEMENTARY BUDGETS 29-Jul-86

SCHEDULE OF RATES

Teachers	$31,385
Curriculum Coord.	$39,494
Program Administrator	$45,555
Clerical	$18,314
Specialist	$46,633

Av'ge Sal Increase 105.0%
Extnded Day % Sal $100,000

PROGRAM

	FTE	1986-87	FT	1987-88	FTE	1988-89	FTE	1989-90	FTE	1990-91	FTE	1991-92
FOREIGN LANGUAGE ELEMENTARY												
Planning												
Task Forces @ $20,000	6	$120,000	2	$40,000		$0		$0		$0		$0
Subject Specialist	1	$46,633	1	$48,965	1	$51,413	1	$53,984	1	$56,683	1	$59,517
Clerical	1	$18,314	1	$19,230	1	$20,191	1	$21,201	1	$22,261	1	$23,374
Supplies & Materials		$65,000		$25,000		$5,000		$5,000		$5,000		$5,000
Equipment $25,000	6	$150,000	2	$50,000	0	$0	0	$0	0	$0	0	$0
Inservice $25,000	6	$150,000	8	$200,000	8	$200,000	8	$200,000	8	$200,000	8	$200,000
Printing & Advertising $15,000	8	$120,000		$0		$0		$0		$0		$0
TOTAL		$669,947		$383,194		$276,604	2	$280,184	2	$283,943	2	$287,891

LONGAN												
Foreign Lang Tchrs	2	$65,906	2	$69,204	2	$72,664	2	$76,297	2	$80,112		
Materials & Supplies		$4,000		$4,000		$4,000		$4,000		$4,000		
Equipment		$12,000		$12,000		$12,000		$12,000		$12,000		
Extended Day		$100,000		$100,000		$100,000		$100,000		$100,000		
Printing & Advertising		$2,500		$2,5000		$2,500		$2,500		$2,500		
SUB TOTAL		$184,409		$187,704		$191,164		$194,797		$198,612		
MOORE												
Foreign Lang Tchrs	2	$65,909	2	$69,204	2	$72,664	2	$76,297	2	$80,112		
Materials & Supplies		$4,000		$4,000		$4,000		$4,000		$4,000		
Equipment		$12,000		$12,000		$12,000		$12,000		$12,000		
Extended Day		$100,000		$100,000		$100,000		$100,000		$100,000		
Printing & Advertising		$2,500		$2,500		$2,500		$2,500		$2,500		
SUB TOTAL		$184,409		$187,704		$191,164		$194,797		$198,612		

WASHINGTON									
Foreign Lang Tchrs	2	$65,909	2	$69,204	2	$72,664	2	$76,297	2	$80,112
Materials & Supplies		$4,000		$4,000		$4,000		$4,000		$4,000
Equipment		$12,000		$12,000		$12,000		$12,000		$12,000
Extended Day		$100,000		$100,000		$100,000		$100,000		$100,000
Printing & Advertising		$2,500		$2,500		$2,500		$2,500		$2,500
SUB TOTAL		$184,409		$187,704		$191,164		$194,797		$198,612
SWITZER/NEW WEST CAMPUS									
Foreign Lang Tchrs			2	$69,204	2	$72,664	2	$76,297	2	$80,112
Materials & Supplies				$4,000		$4,000		$4,000		$4,000
Equipment				$12,000		$12,000		$12,000		$12,000
Extended Day				$100,000		$100,000		$100,000		$100,000
Printing & Advertising				$2,500		$2,500		$2,500		$2,500
SUB TOTAL				$187,704		$191,164		$194,797		$198,612

FAIRMOUNT									
Foreign Lang Tchrs	2	$65,909	2	$69,204	2	$72,664	2	$76,297	2	$80,112
Materials & Supplies		$4,000		$4,000		$4,000		$4,000		$4,000
Equipment		$12,000		$12,000		$12,000		$12,000		$12,000
Extended Day		$100,000		$100,000		$100,000		$100,000		$100,000
Printing & Advertising		$2,500		$2,500		$2,500		$2,500		$2,500
SUB TOTAL		$184,409		$187,704		$191,164		$194,797		$198,612
SUGAR CREEK									
Foreign Lang Tchrs	2	$65,909	2	$69,204	2	$72,664	2	$76,297	2	$80,112
Materials & Supplies		$4,000		$4,000		$4,000		$4,000		$4,000
Equipment		$12,000		$12,000		$12,000		$12,000		$12,000
Extended Day		$100,000		$100,000		$100,000		$100,000		$100,000
Printing & Advertising		$2,500		$2,500		$2,500		$2,500		$2,500
SUB TOTAL		$184,409		$187,704		$191,164		$194,797		$198,612

FRANKLIN										
Foreign Lang Tchrs		3	$98,863	3	$103,806	3	$108,996	3	$114,446	3	$120,168
Materials & Supplies			$4,000		$4,000		$4,000		$4,000		$4,000
Equipment			$25,000		$25,000		$25,000		$25,000		$25,000
Extended Day			$100,000		$100,000		$100,000		$100,000		$100,000
Printing & Advertising			$3,750		$3,750		$3,750		$3,750		$3,750
SUB TOTAL			$231,613		$163,556		$241,746		$147,196		$252,918
MELCHER										
Foreign Lang Tchrs				4	$138,408	4	$145,328	4	$152,595	4	$160,224
Materials & Supplies					$4,000		$4,000		$4,000		$4,000
Equipment					$30,000		$30,000		$30,000		$30,000
Extended Day					$100,000		$100,000		$100,000		$100,000
Printing & Advertising					$5,000		$5,000		$5,000		$5,000
SUB TOTAL					$277,408		$284,328		$192,595		$299,224
TOTAL FOREIGN LANGUAGE	$669,947		$1,536,852		$1,916,792		$1,953,242		$1,991,516		$2,031,705

SCHEDULE OF RATES

ELEMENTARY BUDGETS 29-Jul-86

Aides	$10,759
Teachers	$31,385
Curriculum Coord.	$39,494
Program Administrators	$45,555
Clerical	$18,314
Principal	$45,173

Average Salary Increase	105.0%
Ext. Day % Salaries	$100,000
Computers (W/Software	$1,500

	FTE	1986-87	FTE	1987-88	FTE	1988-89	FTE	1989-90	FTE	1990-91	FTE	1991-92
OTHER PROGRAMS												
ELEMENTARY												
PLANNING												
Task Forces @ $20,000			2	$40,000	4	$80,000	1	$20,000	0	$0	0	$0
Clerical			1	$19,230	1	$20,191	1	$21,201	1	$22,261	1	$23,374
Supplies & Materials				$25,000		$55,000		$5,000		$5,000		$5,000
Printing & Advertising @ $15,000			2	$30,000	4	$60,000	1	$15,000	0	$0	0	$0
Inservice @ $25,000			2	$50,000	6	$150,000	7	$175,000	7	$175,000	7	$175,000
TOTAL			1	$164,230	1	$365,191	1	$236,201	1	$202,261	1	$203,374

PINKERTON LATIN

Principal	1	$47,432							
Resource Tchrs			2	$69,204	2	$72,664	2	$76,297	2	$80,112
Textbooks				$5,000		$5,000		$5,000		$5,000
Computers			10	$15,000	5	$7,500	5	$7,500	5	$7,500
Materials & Supplies		$20,000		$20,000		$20,000		$20,000		$20,000
Equipment		$30,000		$10,000		$10,000		$5,000		$5,000
Printing & Advertising				$2,500		$2,500		$2,500		$2,500
SUB TOTAL	1	$97,432	2	$121,704	2	$117,664	2	$116,297	2	$120,112

NEW N.E. LATIN

Principal			1	$49,803					
Resource Tchrs					2	$72,664	2	$76,297	2	$80,112
Textbooks						$5,000		$5,000		$5,000
Computers					10	$15,000	5	$7,500	5	$7,500
Materials & Supplies				$20,000		$20,000		$20,000		$20,000
Equipment				$30,000		$10,000		$10,000		$5,000
Printing & Advertising						$2,5000		$2,500		$2,500
SUB TOTAL			1	$99,803	2	$125,164	2	$121,297	2	$120,112

FAXON MONTESSORI

Principal	1	$47,432							
Aides			12	$142,342	12	$149,459	12	$156,932	12	$164,778
Resource Tchrs			4	$138,408	4	$145,328	4	$152,595	4	$160,224
Textbooks				$5,000		$5,000		$5,000		$5,000
Materials & Supplies		$20,000		$15,000		$10,000		$10,000		$10,000
Equipment		$30,000		$12,000		$12,000		$12,000		$12,000
Extended Day				$100,000		$100,000		$100,000		$100,000
Printing & Advertising				$2,500		$2,500		$2,500		$2,500
SUB TOTAL	1	$97,432	16	$415,249	16	$424,287	16	$439,026	16	$454,503

GARFIELD CLASSICAL GREEK

Resource Tchrs					2	$72,664	2	$76,297	2	$80,112
Extended Day						$100,000		$100,000		$100,000
Artist/ Residence						$30,000		$30,000		$30,000
Textbooks						$5,000		$5,000		$5,000
Materials & Supplies						$25,000		$20,000		$15,000
Equipment						$12,000		$12,000		$12,000
Printing & Advertising						$2,500		$2,500		$2,500
SUB TOTAL					2	$247,164	2	$245,797	2	$244,612

PITCHER CLASSICAL GREEK								
Resource Tchrs			2	$72,664	2	$76,297	2	$80,112
Extended Day				$100,000		$100,000		$100,000
Artist/ Residence				$30,000		$30,000		$30,000
Textbooks				$5,000		$5,00		$5,000
Materials & Supplies				$25,000		$20,000		$15,000
Equipment				$12,000		$12,000		$12,000
Printing & Advertising				$2,500		$2,500		$2,500
SUB TOTAL			2	$247,164	2	$245,797	2	$244,612
NEW S.E. CAMPUS CLASSICAL GREEK								
Principal	1	$49,803						
Resource Tchrs			2	$72,664	2	$76,297	2	$80,112
Extended Day				$100,000		$100,000		$100,000
Artist/Residence				$30,000		$30,000		$30,000
Textbooks		$20,000		$5,000		$5,000		$5,000
Materials & Supplies		$30,000		$25,000		$20,000		$15,000
Equipment				$12,000		$12,000		$12,000
Printing & Advertising				$2,500		$2,500		$2,500
SUB TOTAL	1	$99,803	2	$247,164	2	$245,797	2	$244,612

NEW S.W. CAMPUS GIFTED & TALENTED								
Principal			1	$52,293				
Resource Tchrs					2	$76,297	2	$80,112
Extended Day						$100,000		$100,000
Textbooks						$5,000		$5,000
Materials & Supplies						$20,000		$15,000
Equipment						$12,000		$12,000
Computers					30	$45,000	30	$45,000
Printing & Advertising						$2,500		$2,500
SUB TOTAL			1	$52,293	2	$260,797	2	$259,612
TOTAL OTHER PROGRAMS	$0	$359,093	$1,101,751	$1,697,101		$1,877,071		$1,891,550

ELEMENTARY BUDGETS 29-Jul-86

SCHEDULE OF RATES

Teachers	$31,385	Average Salary Increase	105.0%
Curriculum Coord.	$39,494	Ext. Day % Salaries	$100,000
Program Administrators	$45,555	Computers (W/Software)	$1,500
Clerical	$18,314		
Specialist	$46,633		

	FTE	1986-87	FTE	1987-88	FTE	1988-89	FTE	1989-90	FTE	1990-91	FTE	1991-92
PHYSICAL SCIENCES												
ELEMENTARY												
PLANNING												
Task Forces												
@ $20,000	2	$40,000	1	$20,000	4	$80,000	2	$40,000	0	$0	0	$0
Subject Specialist	1	$46,633	1	$48,965	2	$102,826	2	$107,967	2	$113,365	2	$119,034
Clerical	1	$18,314	1	$19,230	1	$20,191	1	$21,201	1	$22,261	1	$23,374
Supplies & Materials		$5,000		$5,000		$5,000		$5,000		$5,000		$5,000
Printing & Advertising												
@ $5,000	2	$10,000	1	$5,000	4	$20,000	2	$10,000	0	$0	0	$0
Equipment												
@ $25,000	2	$50,000	1	$25,000	4	$100,000	2	$50,000	0	$0	0	$0
Inservice												
@ $25,000	1	$25,000	3	$75,000	6	$150,000	8	$200,000	8	$200,000	8	$200,000
TOTAL	2	$194,947	2	$198,195	3	$478,017	3	$434,168	3	$340,626	3	$347,408

WEEKS												
Science/ Math Tchrs	4	$145,328	4	$152,594	4	$160,224						
Extended Day		$100,000		$100,000		$100,000						
Textbooks		$5,000		$5,000		$5,000						
Computers	40	$60,000	15	$22,500	15	$22,500						
Materials & Supplies												
Equipment		$4,000		$4,000		$4,000						
Printing & Advertising		$25,000		$20,000		$15,000						
SUB TOTAL		$2,5000		$2,5000		$2,500						
	4	$341,828	4	$306,594	4	$309,224						
THREE TRAILS												
Science/ Math Tchrs	3	$108,996	3	$114,446	3	$120,168						
Extended Day		$100,000		$100,000		$100,000						
Textbooks		$5,000		$5,000		$5,000						
Computers	40	$60,000	15	$22,500	15	$22,500						
Materials & Supplies												
Equipment		$4,000		$4,000		$4,000						
Printing & Advertising		$25,000		$20,000		$15,000						
SUB TOTAL		$2,500		$2,5000		$2,5000						
	3	$305,496	3	$268,446	3	$269,168						

NEW GLADSTONE						
Science/ Math Tchrs	3	$108,996	3	$114,446	3	$120,168
Extended Day		$100,000		$100,000		$100,000
Textbooks		$5,000		$5,000		$5,000
Computers	40	$60,000	15	$22,500	15	$22,500
Materials & Supplies		$4,000		$4,000		$4,000
Equipment		$25,000		$20,000		$15,000
Printing & Advertising		$2,5000		$2,5000		$2,5000
SUB TOTAL	3	$305,496	3	$268,446	3	$269,168
WHEATLEY						
Math/ Science Tchrs	3	$108,996	3	$114,446	3	$120,168
Extended Day		$100,000		$100,000		$100,000
Textbooks		$5,000		$5,000		$5,000
Computers	40	$60,000	15	$22,500	15	$22,500
Materials & Supplies		$4,000		$4,000		$4,000
Equipment		$12,000		$12,000		$12,000
Printing & Adveritising		$2,5000		$2,500		$2,5000
SUB TOTAL	3	$292,496	3	$260,446	3	$266,168

NEW S.E. CAMPUS						
Computer Resource Tchrs	3	$114,446	3	$120,168		
Extended Day		$100,000		$100,000		
Textbooks		$5,000		$5,000		
Computers	60	$90,000	40	$60,000		
Materials & Supplies		$4,000		$4,000		
Equipment		$20,000		$15,000		
Printing & Advertising		$2,5000		$2,500		
SUB TOTAL	3	$335,946	3	$306,668		
RICHARDSON						
Computer Resource Tchrs	2	$76,297	2	$80,112		
Extended Day		$100,000		$100,000		
Textbooks		$5,000		$5,000		
Computers	60	$90,000	40	$60,000		
Materials & Supplies		$4,000		$4,000		
Equipment		$8,000		$5,000		
Printing & Advertising		$2,500		$2,500		
SUB TOTAL	2	$285,797	2	$256,612		

W. ROCK CREEK/KORTE											
Environmental											
Res. Tchrs			4	$131,817	6	$207,612	6	$217,992	6	$228,892	6	$240,337
Textbooks				$23,000		$10,000		$10,000		$10,000		$10,000
Computers			20	$30,000	14	$21,000	12	$18,000	10	$15,000	8	$12,000
Materials & Supplies				$12,000		$20,000		$20,000		$20,000		$20,000
Field Trips				$80,000		$80,000		$80,000		$80,000		$80,000
Equipment				$20,000		$5,000		$5,000		$5,000		$5,000
Printing & Advertising				$2,500		$2,500		$2,500		$2,500		$2,500
SUB TOTAL			4	$298,817	6	$343,612	6	$350,992	6	$358,892	6	$367,337
KNOTTS												
Environmental												
Res. Tchrs					3	$103,806	3	$108,996	3	$114,446	3	$120,168
Textbooks						$10,000		$10,000		$10,000		$10,000
Computers					15	$22,500	12	$18,000	10	$15,000	5	$7,500
Materials & Supplies						$12,000		$12,000		$12,000		$12,000
Field Trips						$40,000		$40,000		$40,000		$40,000
Equipment						$5,000		$5,000		$5,000		$5,000
Printing & Advertising						$2,500		$2,500		$2,500		$2,500
SUB TOTAL					3	$195,806	3	$193,996	3	$196,446	3	$194,668
TOTAL PHYSICAL SCIENCE	2	$194,947	6	$497,012	12	$1,017,435	25	$2,224,473	30	$2,621,639	30	$2,586,421

ELEMENTARY BUDGETS 29-Jul-86

SCHEDULE OF RATES

Teachers	$31,385	Average Salary Increase	105.0%
Curriculum Coord.	$39,494	Ext. Day % Salaries	$100,000
Program Administrators	$45,555	Computers (W/Software)	$1,500
Clerical	$18,314		
Specialist	$46,633		

	FTE	1986-87	FTE	1987-88	FTE	1988-89	FTE	1989-90	FTE	1990-91	FTE	1991-92
PERFORMING ARTS & WRITING												
ELEMENTARY												
PLANNING												
Task Forces												
@ $20,000			4	$80,000	3	$60,000	0	$0	0	$0	0	$0
Subject Specialist			1	$48,965	1	$51,413	1	$53,984	1	$56,683	1	$59,517
Clerical			1	$19,230	1	$20,191	1	$21,201	1	$22,261	1	$23,374
Supplies & Materials				$5,000		$5,000		$5,000		$5,000		$5,000
Printing & Advertising												
@ $15,000			4	$60,000	3	$30,000	0	$0	0	$0	0	$0
Equipment												
@ $25,000			4	$100,000	3	$75,000	0	$0	0	$0	0	$0
Inservice												
@ $25,000			4	$100,000	7	$175,000	7	$175,000	7	$175,000	7	$175,000
SUB TOTAL			2	$413,194	2	$416,604	2	$255,184	2	$258,943	2	$262,891

ATTUCKS COMM. & WRITING						
Communication Res. Tchr	2	$72,664	2	$76,297	2	$80,112
Textbooks		$5,000		$5,000		$5,000
Computers	15	$22,500	10	$15,000	5	$7,500
Materials & Supplies		$4,000		$4,000		$4,000
Equipment		$25,000		$20,000		$15,000
Printing & Advertising		$2,500		$2,500		$2,500
SUB TOTAL	2	$131,664	2	$122,797	2	$114,112
TROOST						
Communication Res. Tchr	2	$72,664	2	$76,297	2	$80,112
Textbooks		$5,000		$5,000		$5,000
Computers	15	$22,500	10	$15,000	5	$7,500
Materials & Supplies		$4,000		$4,000		$4,000
Equipment		$25,000		$20,000		$15,000
Printing & Advertising		$2,500		$2,500		$2,500
SUB TOTAL	2	$131,664	2	$122,797	2	$114,112

NEW W. CAMPUS COMM & WRITING						
Communication Res. Tchrs	2	$72,664	2	$76,297	2	$80,112
Textbooks		$5,000		$5,000		$5,000
Computers	15	$22,500	10	$15,000	5	$7, 500
Materials & Supplies		$4,000		$4,000		$4,000
Equipment		$25,000		$20,000		$15,000
Printing & Advertising		$2,500		$2,500		$2,500
SUB TOTAL	2	$131,664	2	$122,797	2	$114,112
NEW GLADSTONE						
Arts Tchrs	2	$69,204	2	$72,664	2	$76,297	2	$80,112
Extended Day		$100,000		$100,000		$100,000		$100,000
Textbooks		$5,000		$5,000		$5,000		$5,000
Materials & Supplies		$30,000		$30,000		$30,000		$30,000
Artist/ Residence		$25,000		$25,000		$20,000		$15,000
Equipment		$12,000		$12,000		$12,000		$12,000
Printing & Advertising		$2,500		$2,500		$2,500		$2,500
SUB TOTAL	2	$243,704	2	$247,164	2	$245,797	2	$244,612

LONGFELLOW												
Arts Teachers			2	$69,204	2	$72,664	2	$76,297	2	$80,112		
Extended Day				$100,000		$100,000		$100,000		$100,000		
Textbooks				$5,000		$5,000		$5,000		$5,000		
Artist/ Residence				$30,000		$30,000		$30,000		$30,000		
Materials & Supplies				$25,000		$25,000		$20,000		$15,000		
Equipment				$12,000		$12,000		$12,000		$12,000		
Printing & Advertising				$2,500		$2,500		$2,500		$2,500		
SUB TOTAL				$243,704		$247,164		$245,797		$244,612		
MESERVEY												
Arts Teachers			2	$69,204	2	$72,664	2	$76,297	2	$80,112		
Extended Day				$100,000		$100,000		$100,000		$100,000		
Textbooks				$5,000		$5,000		$5,000		$5,000		
Artist/ Residence				$30,000		$30,000		$30,000		$30,000		
Materials & Supplies				$25,000		$25,000		$20,000		$15,000		
Equipment				$12,000		$12,000		$12,000		$12,000		
Printing & Advertising				$2,500		$2,500		$2,500		$2,500		
SUB TOTAL				$243,704		$247,164		$245,797		$244,612		
PHILLIPS												
Arts Teachers			2	$69,204	2	$72,664	2	$76,297	2	$80,112		
Extended Day				$100,000		$100,000		$100,000		$100,000		
Artist/ Residence				$30,000		$30,000		$30,000		$30,000		
Textbooks				$5,000		$5,000		$5,000		$5,000		
Materials & Supplies				$25,000		$25,000		$20,000		$15,000		
Equipment				$12,000		$12,000		$12,000		$12,000		
Printing & Advertising				$2,500		$2,500		$2,500		$2,500		
SUBTOTAL			2	$243,704	2	$247,164	2	$245,797	2	$244,612		
TOTAL ARTS & COMMUNICATION	$0	2	$413,194	10	$1,391,420	16	$1,638,833	16	$1,610,524	16	$1,583,675	

SUMMARY OF PROPOSED BUDGETS 29-Jul-86

MAGNET BUDGET TOTALS

	1986-87	1987-88	1988-89	1989-90	1990-91	1991-92
TOTAL ELEMENTARY	$864,894	$2,806,151	$5,427,398	$7,513,649	$8,100,750	$8,093,351
TOTAL MIDDLE SCHOOL	$3,641,579	$4,612,621	$5,822,239	$7,382,356	$7,683,150	$7,478,185
TOTAL HIGH SCHOOL	$680,097	$3,190,643	$7,480,234	$11,101,919	$14,277,796	$14,421,158
MAGNET SUPPORT	$3,129,702	$3,337,314	$3,819,309	$3,903,847	$3,923,144	$4,044,539
TOTAL	$8,316,272	$13,946,729	$22,549,180	$29,901,771	$33,984,840	$34,037,233

ATTACHMENT "B"

SUMMARY OF CAPITAL FACILITIES COSTS
REQUESTED FOR MAGNET SCHOOLS
AT SEPTEMBER 15, 1966 HEARING

School (Theme) (Date scheduled to open)	Cost Estimates in Capital Improvement Study	Work Funded In Phase II	Beginning Costs	10% Inflation Increment	Magnet School Improvements (net cost)	Total
Central High[1] (Computers) (Sept. 88)						15,248,858
New Paseo Middle School[2] (Visual and Performing Arts) (Sept. 88)	School to be constructed (site acquisition not included)					5,063,000
New Gladstone Elementary (Visual and Performing Arts) (Sept. 88)	School to be constructed (site acquisition not included)					4,779,000
New West (Spanish and Communications)	School to be constructed (site acquisition not included)					6,982,000
Northeast High (Law and Public Service) (Sept. 87)	4,639,698	667,590	3,972,100	397,218	1,383,822	5,753,132

Bingham Middle (Science/Math) (Sept. 87)	1,929,818	248,754	1,681,064	168,186	1,817,300	2,866,478
Central Middle (Computers) (Sept. 87)	3,588,534	543,246	3,845,284	384,528	1,587,375	4,857,187
Lincoln South Middle (Science/Math) (Sept. 87)	1,568,820	489,475	1,158,546	116,854	1,913,580	3,179,898
Southeast Middle (Science/Math) (Sept. 87)	1,358,723	161,711	1,109,812	118,901	1,300,150	3,168,063
Fairmount Elementary (Spanish) (Sept. 87)	Non-request renovation work is not sought at this time[3]				41,200	41,200
Franklin Elementary (Spanish and French) (Sept. 87)					38,000	38,000
Longan Elementary (French) (Sept. 87)					41,200	41,200

Moore Elementary (Spanish) (Sept. 87)	112,500[4]	112,500
Mt. Washington Elementary (German) (Sept. 87)	41,200	41,200
Sugar Creek Elementary (French) (Sept. 87)	41,200	41,200

[1] Construction figures for new Central High School (site acquisition not included). Total renovation cost to existing building would be (illegible)

[2] Site acquisition not included. Temporary facility to be used in Sept. 87, with permanent facility opening Sept. 88.

[3] Only language laboratories being sought for existing elementary schools at September 15 hearing.

[4] Language laboratory cannot be constructed in existing space — addition required.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed July 6, 1987]

Several matters in this case are presently before the Court. The KCMSD has moved the Court to approve the desegregation budget for fiscal year 1987-88. A hearing was conducted on this proposal on May 11 and 12, 1987. The Court will approve a modified budget as set forth in this order. The KCMSD has also moved the Court for funding of estimated deficits for its 1986-87 and 1987-88 fiscal years. Intervenor ATF [sic] Local 691 moved the Court for alternate funding relief regarding teacher's wages. The Court will defer ruling on the motions regarding funding relief until after the August, 1987 hearing on the proposed long range capital improvement plan. The Eighth Circuit has remanded this Court's magnet school orders to permit this Court to set forth its facts and equitable reasons for placing the higher cost burden on the State of Missouri for funding of the magnet school plan. The Court will set forth its findings in this regard which shall be construed as an addendum to its orders of June 16, 1986 and November 12, 1986 in regard to the magnet school program.

PUBLIC INFORMATION

The KCMSD proposes a consolidation of the public information functions of the long range magnet school plan, the KCMSD regular desegregation program, and the KCMSD regular programs into one office operating under a single budget of $419,680.00. The Court approves the consolidation because it would provide a more effective and cost efficient communication medium.

The KCMSD acknowledges that $218,250.00 of the requested budget is provided in the long range magnet plan and thus requests the approval of the balance of $201,430.00. The Court has approved a public information budget of $30,000.00 for each of the first two years of the desegregation plan. The Court will continue the $30,000.00 budget for year three but will not approve the additional $201,430.00 requested by the KCMSD. As acknowledged by the KCMSD, the long term magnet public information office provides for nearly 1/2 of the funding requested for a consolidated office. The Court finds that the $201,430.00 contained in the magnet school budget plus an additional $30,000.00 will supply the KCMSD with the resources needed to provide the public with information on all programs.

PROGRAM EVALUATION

The KCMSD has requested funding of $362,355.00 for evaluation of the desegregation programs, excluding the long range magnet plan, for the first three years of the remedial plan. The Court agrees that these programs should be evaluated. However, a continuing complaint against the KCMSD is that it employs an excessive number of administrative personnel. In this particular instance, the Court is in no position to conclude that the desegregation programs could not be evaluated with the current KCMSD staff. The KCMSD has not provided the Court with a breakdown of the resources and personnel available in its current

evaluation office. Accordingly, the Court will deny KCMSD's request for funding for program evaluation for failure to meet its burden of proof.

DESEGREGATION MONITORING OFFICE

The KCMSD has requested funding of $208,130.00 for the 1987-88 cost of a desegregation monitoring office. KCMSD states that it established this office to coordinate communication between the KCMSD and the desegregation monitoring committee and the other parties to the lawsuit. While this monitoring office may better facilitate these communications, the Court does not find that it is a necessary desegregation expense. In addition, it is the obligation of the KCMSD administrative staff to understand the remedial plan and to see that it is fulfilled. The Court finds that it would be beneficial if the administrators communicated directly with the Desegregation Monitoring Committee and the parties rather than providing requested information to a conduit office. Therefore, the Court will not approve this funding as part of the 1987-88 desegregation budget.

DESEGREGATION MONITORING COMMITTEE

The Desegregation Monitoring Committee is an arm of this Court and has shown itself to be an effective and impartial group committed to achieving the goals outlined in this Court's plan. In order to continue the functions outlined by the Court in the June 14, 1985 order, the budget for the monitoring office will be increased from its present level of $187,950.00 to $256,228.00. This $68,278.00 increase consists of a $1,500.00 increase in operating budget, a 5% increase in salaries and fringe benefits, a $46,191.00 increase in research funds, and a $17,000.00 increase in per diem payments. The research pool budget of $86,191.00 includes $31,191.00 in unexpended funds from the 1986-87 budget. Furthermore, $15,000.00 of the 1987-88 research budget will be used to contract with an independent CPA firm to audit the desegregation program for year two. The

increase in the per diem budget includes funds for payments to the members of the newly created voluntary interdistrict transfer subcommittee as well as an increase in the number of compensable hours of the four subcommittee chairpersons from 100 to 110 hours per year.

IMPROVING STUDENT ACHIEVEMENT

Effective Schools

The KCMSD has proposed a budget of $6,925,000.00 for the effective schools program for 1987-88. This amount consists of $125,000.00 for each of the 25 KCMSD schools with enrollments of 90% or more minority in 1987-88, $100,000.00 for each of the remaining schools, and $100,000.00 to be shared by students at four special schools.

The Court notes that the KCMSD has included Switzer Elementary in the 90% or more minority category. Switzer's enrollment in 1987-88 is estimated to be 37% black and 51% hispanic. The State argues that Switzer should not be included in this category because the Court in its order of June 14, 1985 allocated effective schools funding based upon the percentage of blacks enrolled in the particular schools, not their percentage of minorities. *Jenkins* v. *State of Missouri*, 639 F.Sup. 19, 33 (W.D. MO.1985). While the Court did indeed use the language cited by the State, the Court has treated the hispanic race as a minority throughout the remedial plan as evidenced by the Court's selection of hispanics to serve on the Desegregation Monitoring Committee. Therefore, the Court approves of Switzer being included in the 90% or more category.

KCMSD has also requested effective schools funding for those schools which are scheduled to become magnets in 1987-88 under the long term magnet school plan approved by this Court. In its order of June 16, 1986, this Court eliminated effective schools funding for the initial six magnet schools it had

approved because the magnet components were intended to achieve the same goals of increased student achievement sought by the effective schools program. The Court believes that the magnet programs will make schools truly effective. Therefore, the Court will also eliminate effective schools funding for those schools scheduled to offer magnet programs in 1987-88. Included in the list of the 62 schools for which the KCMSD requests effective schools funding are thirteen school scheduled to become magnets under the long range magnet school plan in 1987-88. Accordingly, the effective schools funding requested for these schools, $1,375,000.00, will not be approved by the Court.

Finally, the KCMSD requests $100,000.00 to be shared by four schools which have specialized programs and are attended by students from other schools throughout the KCMSD. The Court allowed a total of $75,000.00 for these schools in 1986-87, and finds that the continuation of these programs is beneficial and will approve KCMSD's funding request for 1987-88.

For the reasons stated above, the Court will approve funding for the effective schools program in 1987-88 in the amount of $5,550,000.00.

Reduction in Class Size

The KCMSD has requested funding of $8,360,705.00 for the 1987-88 cost of teachers required to meet the class size levels ordered by this Court. In addition, KCMSD asks that $89,430.00 in moving costs incurred by KCMSD in reallocating space to reach these court ordered goals be recognized as a desegregation expense.

The $8,360,705.00 requested includes an amount for 160 additional teachers that KCMSD projects are required to finally achieve the class size levels ordered by this Court. The Court finds that the 160 teachers are in addition to the 45 teachers the

KCMSD had intended to furlough in 1985-86 and which the Court instructed the KCMSD to retain since they would be needed for the desegregation plan in 1985-86. The State argues that the KCMSD's estimate of additional teachers needed is excessive because it will result in some classes having considerably fewer students than the maximum levels ordered by he Court. Based upon the evidence presented at the hearing, the Court finds that there will be relatively few such classes, that they are inevitable, and they are necessary to insure that other classes do not exceed the Court ordered levels.

In addition, the State argues that the class size reduction should only be implemented in schools 90% or more black. The Court rejects this argument because the Court's remedial plan is intended to improve the quality of education of all KCMSD students. Furthermore, the State's plan would likely create a two-tier system which the Court is feverishly trying to avoid.

Finally, the Court will approve the $89,430.00 in relocation costs incurred by the KCMSD in achieving the Court ordered levels as a desegregation expense.

Accordingly, the Court will approve funding for the class size reduction component in 1987-88 in the amount of $8,450,135.00.

Summer School

The KCMSD has requested $1,295,764.00 for the summer school component for 1987-88, an increase of approximately $100,000.00 from 1986-87. The State argues that the budget is excessive because the KCMSD did not meet its projected enrollments on which the Courts's 1986-87 funding was based, and yet projects the same enrollments for 1987-88. The KCMSD did in fact meet its enrollment projections at the elementary level while it admittedly fell short at the junior and senior high school levels. The proposed budget provides money for additional transportation and includes a new position of coordinator of instruction.

These additional components will certainly improve the summer school program and will likely attract additional students. Therefore, the Court will give the KCMSD another year to meet the projected enrollments. Accordingly, the Court will approve the requested summer school budget in the amount of $1,295,764.00.

In a related matter, the KCMSD claims that the State has refused to include the KCMSD summer school students in its foundation formula payment calculations for years 1985 and 1986. The State claims that to do so would effect a double payment since it is already paying 50% of the summer school component under the desegregation budget. The Court finds the State's argument to be without merit because the desegregation budget only includes funds for the added expenditures required under the Court's desegregation orders. The base operating costs of the KCMSD summer school program are funded through the KCMSD operating budget for which it relies on the State's foundation formula payments for a portion of its revenues. Therefore, the State is directed to include the KCMSD summer school students in its foundation formula calculations.

Full Day Kindergarten

The KCMSD has requested funding of $1,826,964.00 for this program in 1987-88, an increase of $232,468.00 over 1986-87. Pursuant to this Court's orders, the KCMSD has hired 58 additional teachers to facilitate a full day kindergarten program in the KCMSD. These additional teachers increase the total number of kindergarten teachers in the KCMSD to 158. The KCMSD states that no additional teachers are needed for 1987-88. However, the proposed budget includes funds for three resource teachers to train and assist the regular kindergarten teachers in making effective use of the additional class time through new learning activities in the kindergarten curriculum. The budget also requests funding for additional supplies and equipment needed for a full day program and for a clerical position to assist in preparation of these materials. The budget

also includes $54,000.00 in workshop stipends for the 158 regular teachers. The Court finds that these requests are reasonable and will enhance the quality of education provided kindergarten students within the KCMSD.

The State argues that only 58 of the 158 teachers were hired under the desegregation budget and only the workshop stipends of those 58 teachers should be a desegregation expense. The Court finds the State's argument to be without merit. The Court's remedial plan required all KCMSD kindergarten schools to become full day programs. Thus, the cost of training all the kindergarten teachers to instruct a full day program, regardless of whether their salary comes from the KCMSD operating or desegregation budget, are desegregation expenses.

Accordingly, the Court will approve funding for the full day kindergarten program for 1987-88 in the amount of $1,826,964.00.

Before and After School Tutoring

The KCMSD has proposed a budget of $233,759.00 for the before and after school tutoring program for 1987-88. This represents an increase of $129,359.00 over the 1986-87 budget.

The increase primarily consists of funding for transportation and the addition of certified teachers to replace the teaches aides and volunteers presently used. The State argues that the KCMSD has not justified doubling the budget for a program which has not succeeded in terms of projected enrollments. While the State is correct in stating that the program has not succeeded as anticipated, the Court finds that the lack of transportation was the primary reason why many students were not able to participate in the program. Moreover, the addition of certified teachers will certainly improve the quality of the tutoring and may attract additional students. Therefore, the Court will approve the funding requested by the KCMSD, thereby giving the KCMSD another year to meet its projected enrollments.

Early Childhood Education

The KCMSD has requested funding of $3,102,178.00 for this program in 1987-88, an increase of $1,550,392.00 over 1986-87. The State supports the expansion of this program with the exception of the addition of a specialist position at a salary of $41,544.00. During the hearing, Mr. Mike Jones, coordinator of both the full day kindergarten and early childhood programs, testified that the KCMSD's proposal promotes him to the position of specialist for which he would retain responsibility of both programs, and adds the position of coordinator for the early childhood program. This new coordinator would be in charge of the day to day operations of the early childhood program. The 1987-88 budget also eliminates the position of a resource teacher. The Court finds that this proposal is very reasonable as it would provide more effective operation of both the early childhood and full day kindergarten programs. Furthermore, the net budget increase created by the upgrading of Mr. Jones, the addition of a new coordinator, and the elimination of a resource teacher is only $15,227.00 over 1986-87.

For the reasons stated, the Court will approve funding for the early childhood program in the amount of $3,102,178.00 for 1987-88.

Long Range Magnet School

The KCMSD has requested approval of $17,137,993.00 for the implementation costs of the long range magnet plan in 1987-88. This figure includes the $13,946,729.00 cost of implementation of the long range magnet plan for 1987-88 previously approved by the Court, $8.9 million of which the KCMSD and the State are jointly and severally liable, with the State solely liable for the balance. The KCMSD states that the balance of the total $17.1 million requested is for the cost of the base personnel and resources of two new magnets scheduled to open in 1987-88 (Lincoln South and New Paseo Middle School). These base

costs include salaries for a principal, teachers, librarian, custodians and other support personnel, as well as nonsalary items including textbooks and various supplies. (These costs were not included in the long range magnet budget approved by the Court). The Court finds that these expenditures are desegregation expenses. However, the establishment of these two new magnet schools will result in costs avoided elsewhere within the KCMSD since nearly all of the students transferring to these new magnets are presently KCMSD students. Therefore, the Court will approve the proposed base personnel and resources costs in 1987-88 of these two new magnet schools as desegregation costs, but will reduce the approved amount by the costs avoided elsewhere in the KCMSD as their amount becomes available.

Accordingly, the Court will approve $17,137,993.00 for the implementation of the long range magnet school plan as part of the 1987-88 desegregation budget.

1986-87 Magnet Schools

The KCMSD has submitted an operating budget of $12,257,529.00 for the six magnet schools implemented in September, 1986 pursuant to the Court's June 16, 1986 order. The budget represents a $615,198.00 decrease from the 1986-87 budget. After carefully reviewing the submitted budget, the Court finds that these expenditures are reasonable in cost and necessary for the effective operation of these magnets. Accordingly, the Court will approve the funding requested.

AAA Achievement

The KCMSD has requested funding of $6,340,614.00 for the AAA achievement component in 1987-88, a decrease of $2,450,083.00 from 1986-87. The proposed budget consists of $4,057,383.00 for professional staff and teachers' aides with the balance for library resources needed to maintain the AAA level in 1987-88. The Court finds that these expenditures are reason-

able in cost and necessary to maintain AAA level and will approve the requested funding in the amount of $6,340,614.00.

SWAS, DRP and STEPS

The KCMSD proposes a separate budget of $1,205,558.00 for the SWAS, DRP, and STEPS programs that are presently funded from the effective schools budget. The Court agrees with the KCMSD that these programs are innovative programs which offer realistic prospects for progress in dealing with the problems of urban education. However, the Court finds that since these programs are aimed at improving student achievement that they should remain under the effective schools component of the remedial plan, and should continue to obtain their funding from the effective schools budget approved by the Court. If the KCMSD believes there is insufficient funds in the effective schools budget to support these programs, then the KCMSD should ask the Court to increase the effective schools funding.

Accordingly, the Court will not approve the KCMSD's proposed separate budget for the SWAS, DRP and STEPS programs.

Capital Improvements

The KCMSD has requested that the Court recognize approximately $3.5 million in capital improvement related costs incurred by the KCMSD as desegregation expenses of the district.

This amount includes $811,584.00 in costs to be incurred by the KCMSD in relocating students to other facilities while the Court ordered capital improvements on the 1986-87 magnets are in process. In its order of June 16, 1986, the Court stated that the KCMSD may use up to $480,000.00 of the $12.8 million approved for capital improvement expenditures on these magnets to purchase classroom modules if necessary to complete these improvements without displacing the students from their present schools. *Jenkins* v. *State of Missouri*, 639 F.Supp. 19, 53

(W.D.Mo.1986). The Court maintains this position and thus will not recognize expenses incurred by the KCMSD in relocating these students as a desegregation expense.

The KCMSD also requests that the Court recognize as a desegregation expense approximately $2.24 million that it will spend in 1987=88 to maintain the $37 million in capital improvements ordered by the Court in its June 14, 1985 order. This request will be denied because the maintenance of these improved facilities is the sole responsibility of the KCMSD. In its order of June 14, 1985, the Court stated:

> After the capital improvements have been made, it will be incumbent upon KCMSD to include in its budget funds for the maintenance of the improved facilities.

Jenkins v. *State of Missouri*, 639 F.Supp. 19, 41 (W.D.Mo.1985).

The KCMSD has also requested the Court to recognize the cost of obtaining its share of funding for capital improvements as a desegregation expense of the KCMSD. In its order of June 14, 1985, the Court required KCMSD to contribute $10,000,000.00, and the State $27,000,000.00, for improvements to KCMSD's facilities. In raising its portion of the funding, KCMSD claims that it will incur interest costs of approximately $6,000,000.00 over a ten year period, with the 1987-88 costs estimated at $353,061.00. The Court finds that because these interest costs will be incurred in fulfilling KCMSD's obligation under the remedial plan, they are properly desegregation expenditures. Therefore, the Court will recognize the estimated interest costs for 1987-88 of $353,061.00 as a desegregation expense.

Summary of 1987-88 Desegregation Budget

Public information	$30,000.00
Desegregation Monitoring Office	-0-
Program Evaluation	-0-
Segregation Monitoring Committee	$256,228.00
Effective Schools	$5,550,000.00
Reduction in Class Sizes	$8,450,135.00
Summer School	$1,295,764.00
Full Day Kindergarten	$1,826,964.00
Before and After School Tutoring	$233,759.00
Early Childhood Education	$3,102,178.00
Long Range Magnet Schools	$17,137,993.00
1986-87 Magnets	$12,257,529.00
AAA Achievement	$6,340,614.00
SWAS, DRP and STEPS	-0-
Capital Improvements (Interest)	$353,061.00
Total	$56,834,225.00

FUNDING OF 1987-88 DESEGREGATION BUDGET/ REMAND OF THE COURTS MAGNET SCHOOL ORDERS

In its opinion of December 5, 1986, the United States Court of Appeals for the Eighth Circuit concluded that this Court made no findings which substantiate placing a greater financial burden on the State than that placed on the KCMSD for funding of the effective schools, capital improvements, and achievement of AAA standards. At the time this Court entered its orders of June

16, 1986 and November 12, 1986 requiring the State and the KCMSD to fund and implement a comprehensive magnet school plan, the Court did not have the privilege of having the Eighth Circuit's opinion. Subsequently, this Court was granted leave to modify its magnet school orders to set forth its facts and equitable reasons for placing the higher cost burden on the State for funding of the magnet school plan. The Court's reasoning is set forth below and also provides the basis for the Court's apportionment of the funding responsibility of the KCMSD and the State of Missouri for the 1987-88 desegregation budget.

This Court need not specify the various acts that precipitated the Court's finding of liability on the part of the State and the KCMSD because those acts are set forth in this Court's original liability order and are well summarized in the dissent of Judge Lay in *Jenkins* v. *State of Missouri*, 807 F.2d 657, 700-702 (8th Cir. 1986). There is no question that the State of Missouri solely created separate schools for black and white children in Missouri through legislation and constitutional mandate. Furthermore, the State and the KCMSD both failed in their obligation which commenced in 1954 to eliminate the vestiges of unlawful discrimination caused by the dual school system. In determining the proportionate responsibility of these two constitutional violators to fund the remedial plan, the Court applied the simple principle that "the person who starts the fire has more responsibility for the damages caused than the person who fails to put it out." In the instant case, the State, the entity which started the fire, i.e. the unlawful segregation, also shared the responsibility with the KCMSD to put it out.

The creation of a dual system was mandated by the State and the KCMSD had no choice but to operate a dual school system until May, 1954. For this reason the State should be required to shoulder more of the costs for the removal of the vestiges of its unconstitutional mandates than the KCMSD, which was required by Missouri law to follow the State's mandates. In

addition, since the victims of the vestiges of discrimination are residents of the KCMSD, those victims should not be required to share equally the costs of removing the vestiges with the entity that mandated the conditions creating them.

In addition, the population of Kansas City, Missouri in 1980 constituted 9.1% of the total population of the State of Missouri. Assuming that the KCMSD population is equal to that of Kansas City, Missouri, the Court finds that it is clearly inequitable to require 9% of the State's population to pay 50% of the desegregation costs ordered in the remedial plan. Such a situation would be even more inequitable in the present case where the KCMSD residents are also contributing to the State's portion of the desegregation costs through payment of state taxes.

While the Court does not have an exact estimate of the ultimate cost of implementing the entire remedial plan, it does know that the ultimate cost will be in the hundreds of millions of dollars. The Court is of the opinion and finds that even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan.

It is well settled that a district court has wide discretion in allocating damages among nonsettling defendants in civil cases. *Parson* v. *Kaiser Aluminum and Chemical Corporation*, 583 F.2d 132, 133-34 (5th Cir. 1978) *cert. denied*, 441 U.S. 968, 99 S.Ct. 2417, 60 L.Ed.2d 1073 (1979). Apportionment of damages according to fault is further supported by the Uniform Comparative Fault Act as adopted by the Missouri Supreme Court in *Gustafson* v. *Benda*, 661 S.W.2d 11 (Mo. 1983). In addition, the Supreme Court has stated that a court of equity may go much further in giving relief in furtherance of a public interest than they are accustomed to go when only private interests are involved. *United States* v. *First National City Bank*, 379 U.S. 378, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965). With these considerations in mind, this Court concluded that the relative fault of the State of Missouri in this action was 75% and the KCMSD 25%.

The Court has consistently applied these percentages of fault determinations in assessing damages in all phases of its remedial plan, including its comprehensive magnet school orders of June 16.1986 and November 12, 1986. Funding responsibility for the 1986-87 magnets, approximately 50% for both parties, may appear to be inconsistent with the fault assessments determined by the Court. However, the funding for the 1986-87 magnet schools was included in the overall 1986-87 desegregation budget for which the Court ordered the KCMSD to fund approximately 25% of the entire budget.

Regarding the 1987-88 desegregation budget, the Court will order that the State and the KCMSD will be jointly and severally liable for the entire budget with contribution between the two constitutional violators to be 75% or $42,625,668.00 by the State, and 25%, or $14,208,557.00 by the KCMSD. The joint and several liability will be ordered pursuant to the Eighth Circuit's mandate that "remedy ordered by the Court be fully funded." *Jenkins* v. *State of Missouri*, 807 F.2d 657, 686 (8th Cir. 1986). Furthermore, in the event that this Court is found to be incorrect in its apportionment of damages, the joint and several liability finding will insure that the remedial plan will be fully funded and guarantee to the plaintiffs the programs to which they are entitled.

The Court notes that its funding apportionment for the 1987-88 desegregation budget, which includes the implementation costs of the long term magnet plan for 1987-88, appears inconsistent with the Court's previous funding allocation in its order approving the long range magnet plan. The court's order of November 12, 1986 apportioned funding for the 1987-88 implementation costs of the long range magnet plan at approximately 33% KCMSD and 66% the State of Missouri. However, the KCMSD's portion of the total implementation costs of the long range magnet plan plus the $53 million in capital improvements approved in the November 12, 1986 order is approximately 25%, and is therefore consistent with the Court's present action.

KCMSD'S MOTION FOR FUNDING OF DEFICITS

KCMSD project that it will have a deficit of $7.3 million in fiscal year 1986-87 and $52.2 million in 1987-88 due to its funding obligations under the desegregation plan. The estimated deficit for 1987-88 is based on the proposed 1987-88 budget which the Court is modifying. Therefore, the estimated deficit for 1987-88 will be less than projected by the KCMSD. Notwithstanding, the KCMSD has asked the Court to enjoin the tax levy rollback required by R.S. Mo § 164.013 for fiscal year 1988 and to require the State of Missouri to advance KCMSD's portion of the desegregation funding for fiscal years 1987-88 with the understanding that the KCMSD would repay the State when such funds are available.

The Court will defer ruling on this motion until after the August 3, 1987 hearing on the long range capital improvement plan submitted by the parties. However, it is the Court's intention to generate KCMSD's portion of the desegregation funding through imposition of either an earnings tax or a state income tax surcharge.

Accordingly, it is hereby

ORDERED that the Court approves the 1987-88 desegregation budget as set forth in this opinion; and it is further

ORDERED that the State and the KCMSD are jointly and severally liable for the 1987-88 desegregation budget totalling $56,834,225.00 and the State of Missouri and the KCMSD are directed to contribute $42,625,668.00 and $14,208,557.00 respectively; and it is further

ORDERED that the Court defers ruling on the motions of KCMSD and AFT Local 961 regarding funding of estimated budget deficits until after the August 3, 1987 hearing on the long range capital improvements plan; and it is further

ORDERED that the Court has modified its June 16, 1986 and November 12, 1986 orders as set forth in this opinion.

/s/ Russell G. Clark
RUSSELL G. CLARK,
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: July 6, 1987

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed August 19, 1987]

This case comes before the Court on KCMSD's motion to amend the Court's July 6, 1987 order on the 1987-88 desegregation budget. KCMSD's request for continuation of effective schools funding for the new magnet schools will be granted. KCMSD's request for additional effective schools funding will be denied. KCMSD's request that the Court recognize the cost of relocating students during court ordered capital facilities work at Lincoln Academy and Lincoln South Middle School will be granted. Finally, KCMSD's request for funding of evaluation expenses will be denied.

Effective Schools Funding

In its order of July 6, 1987, the Court eliminated effective schools funding for thirteen schools scheduled to become magnets under the long-range magnet school plan in 1987-88. The Court did so because one purpose of the magnet program is to achieve the same goal of increased student achievement sought by the effective schools program. However, after reconsidering the testimony given by Dr. Daniel Levine at the September 16,

1986 hearing on the long-range magnet school plan (Tr. 234-235), the Court finds that the effective schools funding is needed to ensure that the basic curriculum in the magnet schools in equal to that in the nonmagnets. This equality is necessary to attract students from private schools and suburban districts and to provide all students presently in the KCMSD with the strong basic education that they have been unconstitutionally denied. Accordingly, the Court continues effective schools funding in the following amounts for the schools which are scheduled to become magnets under the long-range magnet school plan in 1987-88.

Elementary	
Longan	$125,000.00
Moore	$100,000.00
Mt. Washington	$100,000.00
North Rock Creek/Korte	$100,000.00
Fairmont	$100,000.00
Sugar Creek	$100,000.00
Middle Schools	
New Paseo	$100,000.00
Lincoln South	$ 20,000.00
Bingham	$ 20,000.00
Central	$ 20,000.00
Southeast	$ 20,000.00
High Schools	
Northeast	$100,000.00
Total	$905,000.00

This additional funding increases the total effective schools budget for 1987-88 to $6,455,000.00. As stated in the Court's

July 6, 1987 order, the State of Missouri and the KCMSD are jointly and severally liable for this amount with contribution between the two constitutional violators to be 75% State and 25% KCMSD.

The KCMSD also moves the Court to reconsider its request for additional funds to finance the central coordination and expansion of the SWAS, DRP, and STEPS programs as part of the effective schools component. The Court finds that funds for the central coordination of these programs is inconsistent with the original purpose of the effective schools program. As the Court stated in its original remedy order of June 14, 1985, the effective schools program is a "bottom up" program in which local school administrators, teachers, and parents determine the needs of their particular school and target the funds accordingly. Therefore, the Court does not recognize as a desegregation expense any funds for the central coordination of these programs.

Regarding the expansion of these programs, the Court acknowledges that the DRP, SWAS, and STEPS programs are innovative educational programs but finds that the KCMSD evaluation reports on these programs do not warrant additional court-ordered funding for their expansion at this time. For the reasons stated, KCMSD's request for an additional $659,919.00 in effective schools funding is denied.

Relocation Costs

In its order of July 6, 1987, the Court refused to recognize as a desegregation expense costs incurred by the KCMSD in relocating students while the court ordered capital improvements on the 1986-87 magnets were in progress because the Court had previously approved $480,000.00 for the purchase of classroom modules to house students during the renovations. However, the KCMSD in its present motion has demonstrated that the module classrooms are not sufficient to house the

students at Lincoln Academy while the court ordered improvements are being completed. The KCMSD has decided to temporarily house these students at the Lincoln South Middle School facility which is scheduled to become a math/science magnet in the fall of 1987. The KCMSD presently asks the Court to reconsider approving $454,687.00 to modify the Ashland School as a temporary site for the Lincoln South magnet. The KCMSD has filed an itemized estimate of these expenditures and the Court finds them necessary and their amount reasonable and will recognize them as desegregation expenses. However, because the KCMSD did not present this itemized estimate at the 1987-88 budget hearing, the Court approves them subject to the State's right to challenge the amount of the estimated costs of the relocation. The State of Missouri and the KCMSD are jointly and severally liable for these costs with contribution to be 75% State and 25% KCMSD.

Evaluation Expenses

The Court in its July 6, 1987 order denied KCMSD's request for $362,355.00 to fund the evaluation of the desegregation programs because the court simply could not determine whether these programs could be evaluated with current KCMSD staff. The KCMSD hadfailed to provide a breakdown of the resources and personnel available in its current evaluation office. In the present motion, the KCMSD submitted its estimated evaluation budget for 1987-88 and its actual budget for 1984-85, the year prior to the implementation of the initial desegregation programs. Even with this information, the Court is in no position to conclude that the current desegregation programs can not be evaluated with the KCMSD evaluation office as it existed prior to the court ordered desegregation programs. The Court simply refuses to approve additional administrative personnel and resources unless it is shown that they are absolutely necessary. Therefore, KCMSD's request for $137,643.00 to fund an expansion of the evaluation office and $85,000.00 for contracted evaluation services is denied.

In addition, the KCMSD seeks $45,504.00 to update its student evaluation program to an ITBS system. KCMSD is required to conduct student evaluations in its basic educational program and would administer these tests even absent a court ordered desegregation program. Therefore, this expense is to be borne solely by the KCMSD and is not recognized as a desegregation expense.

Accordingly, it is hereby

ORDERED that KCMSD's motion to modify the Court's July 6, 1987 order is granted in part and denied in part as set forth in this order.

/s/ Russell G. Clark
RUSSELL G. CLARK,
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: August 19, 1987

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: September 15, 1987]

On August 3-6, and 10-12, 1987, this Court conducted a hearing on KCMSD's motion for approval of its long-range capital improvement plan. After careful consideration, the Court approves the plan as modified in this order and orders funding of those projects schedule for completion by the fall of 1990. The KCMSD also submitted for the Court's approval a student transportation plan for the long-range magnet school plan in 1987-88. The State objects to the plan and suggests that a hearing on the plan may be required. The Court will defer ruling on the motion at this time and will give the parties an opportunity to confer in an attempt to reach an agreement on a plan and if necessary to engage in discovery. If a hearing is necessary, it is hereby set to commence on December 14, 1987 at 9:00 a.m. In addition, KCMSD had also moved the Court for funding of its projected operating and desegregation budget deficits through 1987-88. The Court will deny the specific relief requested by the KCMSD but will provide KCMSD with additional resources to fund the share of its known and projected costs of the desegregation plan through 1992. Finally, AFT 691's motion for

alternate funding relief regarding KCMSD teacher salaries will be denied as a specific part of this remedial order as the Court is of the opinion that any salary increase should be left to the discretion of the school board.

Before addressing KCMSD's request for the Court's approval of its long-range capital improvement plan, a brief review of the capital improvements previously ordered by the Court is in order. In its original remedy order of June 14, 1985, the Court approved $37,000, to be applied toward the most critical capital improvement needs of the KCMSD and reserved judgment as to whether additional capital improvements would be needed. *Jenkins* v. *State of Missouri*, 639 F.Supp. 19, 41 (W.D. Mo. 1985). On June 16, 1986, the Court authorized an additional $12,877,330 in capital improvement expenditures for the six schools that became magnets in 1986-87 under the desegregation plan. *Jenkins*, 639 F.Supp. at 53. At that time the Court also ordered the KCMSD to submit a long-range capital improvement plan by January 5, 1987. *Id.*

Next, the Court approved $52,858,301 for capital improvements to eleven KCMSD schools that are to become magnets in the fall of 1987 under the court-ordered long-range magnet school plan. Order of November 12, 1986 at p.5 Most recently, the Court approved $7,376,135 for the purchase and renovation of the Jewish Community Center for use as a temporary performing arts middle school magnet in 1987-88. Order of April 29, 1987 at p.3.

Turning to the matter presently before the Court, the KCMSD has submitted a $265,000,000 long-range capital improvement plan calling for the renovation and construction of approximately 72 schools and six other facilities through the fall of 1996. The Desegregation Monitoring Committee unanimously approved the plan on February 2, 1987. The plaintiffs and AFT 691 are generally in favor of KCMSD's plan. On the contrary, the State strongly opposes the plan and has submitted an alternate

proposal calling for approximately $61,000,000 in renovations to existing KCMSD schools.

The present conditions of the KCMSD schools have been improved by the $37,000,000 in capital improvements undertaken pursuant to the Court's order of June 14, 1985 (testimony of Dr. R. Hunter, KCMSD Exh. 7). This work has primarily been on the exteriors of the school buildings and the surrounding playgrounds which has resulted in making them weatherproof and thus preventing further deterioration. The improved exterior appearance of these schools serves as an increased incentive for parents to enroll their children in the KCMSD. However, the overall condition of the KCMSD school buildings, particularly the interiors, is generally depressing and thus adversely affects the learning environment and continues to discourage parents who might otherwise enroll their children in the KCMSD (testimony of Dr. Hunter, C. Eppes, D. Osbourn, KCMSD Exh. 6).

The KCMSD facilities still have numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments (testimony of Dr. Hunter, KCMSD Exh. 6). The specific problems include: inadequate lighting; peeling paint and crumbling plaster on ceilings, walls and corridors; loose tiles, torn floor coverings; odors resulting from unventilated restrooms with rotted, corroded toilet fixtures; noisy classrooms due to lack of adequate acoustical treatment; lack of off street parking and bus loading for parents, teachers and students; lack of appropriate space for many cafeterias, libraries, and classrooms; faulty and antiquated heating and electrical systems; damaged and inoperable lockers; and inadequate fire safety systems (testimony of Dr. Hunter, C. Eppes, D. Osbourn, C. DesMoineaux, KCMSD Exh. 6). The conditions at Paseo High School are such that even the principal stated that he would not send his own child to that facility (testimony of R. Meadows).

Unquestionably, the deterioration of the KCMSD facilities is due to deferred maintenance by the KCMSD. However, as the Court found in its order of November 12, 1986, the State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools. Order at p. 4. Furthermore, the Court has the responsibility of providing the victims of unlawful segregation with the educational facilities that they have been unconstitutionally denied. Therefore, a long-range capital improvement plan aimed at eliminating the substandard conditions present in KCMSD schools is properly a desegregation expense and is crucial to the overall success of the desegregation plan.

STATES CAPITAL IMPROVEMENT PROPOSAL

The State of Missouri has submitted a capital improvement plan to remedy what it perceives as the substandard conditions present in the KCMSD (state Exh. 8). The scope of the work contained in the State's plan is estimated to cost $61,074.565, approximately $200,000,000 less than the estimated cost of KCMSD's long-range capital improvement plan. For the following reasons, the Court finds that the State's proposal is unsatisfactory because it fails to remedy the substandard conditions in the KCMSD schools.

First, the State failed to consider the criteria of suburban comparability in evaluating the capital improvements to be made to the KCMSD schools. The Court in its order of June 14, 1985 specifically stated that capital improvements needed to bring KCMSD's facilities to a point comparable with the facilities in the neighboring suburban districts should be reviewed. Notwithstanding, Dr. Robert Bartman, Acting Commissioner of Education for the State of Missouri, instructed its architect, David Pearce, to only estimate the capital improvements necessary to eliminate health and safety hazards and to provide a good

learning environment. Mr. Pearce testified that he compiled his estimates before he visited any suburban schools.

Specifically, the State's proposal does include funds for work needed on the electrical, mechanical, and ventilating systems to meet code requirements. However, the State's proposal does not provide sufficient funds for the updating of those systems to insure that the equipment does not suffer frequent breakdowns (testimony of D. Osbourn, C. DesMoineaux). In addition, the State proposes to paint only those specific areas on walls and ceilings which are repaired (testimony of D. Pearce). With regard to floor coverings, the State proposes to replace only those tiles which are loose or damaged with a new tile of similar color and style. Likewise, only the sections of carpeting which are worn or torn would be replaced under the State's plan. This "patch and repair" approach proposed by the State would not achieve suburban comparability or the visual attractiveness sought by the Court as it would result in floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing different shades of paint.

The Court also questions whether the State has budgeted sufficient funds to perform the limited scope of work that it proposes. For example, the State budgeted only $5,000 for plastering at Paseo High School, unquestionably one of KCMSD's facilities most in need of renovation or reconstruction (testimony of Dr. Hunter, D. Pearce, D. Osbourn). KCMSD has budgeted approximately $211,000 for plastering and $230,000 for interior painting at the same institution.

Other deficiencies in the State's proposal are a lack of funds for acoustical treatment in classrooms, or for floor covering on the bare concrete floors found in many restrooms. Such covering would eliminate one of the primary causes of the stench in these toilet areas (testimony of D. Osbourn). Furthermore, the State's proposal only provides handicap access to one level of each KCMSD school, thereby restricting handicapped students' ac-

cess to many of the facilities and special programs offered by the KCMSD (testimony of C. Eppes). The State does not provide any funds for locker repair despite testimony by its own architect that many of the lockers are damaged, rusted, and missing doors. The State's plan does not include funding to reconfigure spaces within the KCMSD schools to provide adequate classrooms, library, cafeteria, and administrative areas.

The Court also notes that the State failed to estimate the cost necessary to provide magnet facilities needed to implement the long-range magnet school plan approved by the Court on November 12, 1986. The State argues that the broad contours of the magnet relief ordered are uncertain at best and suggests that the Court "reserve judgment on magnet related projects to a time when the scope of the magnet relief is more certain." State's Alternative Proposals Concerning Remaining Capital Improvements Funding for KCMSD, 6/3/87 pp. 29-30. The Court is certainly not surprised by the State's "wait and see" position but finds that such an approach would seriously damage the prospects of true desegregation in the KCMSD. The magnet plan is working as evidenced by the large number of applications for the magnet programs from students new to the KCMSD, and this Court is committed to its full implementation and will order the construction of the magnet facilities as part of the long-range capital improvement plan.

In conclusion, if the KCMSD schools underwent the limited renovation proposed by the State, the schools would continue to be unattractive and substandard, and would certainly serve as a deterrent to parents considering enrolling their children in KCMSD schools. Therefore, the Court rejects the State's plan and will next consider the long-range plan submitted by the KCMSD.

KCMSD'S LONG-RANGE CAPITAL IMPROVEMENT PLAN

The KCMSD has submitted for the Court's approval a long-range capital improvement plan which calls for the renovation of approximately 55 schools, the closure of 18 facilities, and the construction of 17 new schools by the fall of 1996. However, the KCMSD is presently seeking funding for only that portion of the plan which is scheduled for completion by the fall of 1990. KCMSD estimates the cost of these renovations and new facilities at $194,328,578.

The KCMSD employed three architectural firms to review all its school facilities and determine what work was necessary to renovate the buildings. These architects applied the criteria set forth by the Court in estimating the scope of the work required to remedy the deteriorating conditions that exist in the KCMSD as a result of unlawful segregation. The result of their evaluations are contained in the 1985 capital improvement study (KCMSD Exh. 23). These architects have amended these estimates to reflect work which has been completed, or will be completed pursuant to previous court orders and to reflect inflation (KCMSD Exh. 13, 14, 15 and 18). These renovations will eliminate the existing health and safety hazards identified by the Court and will correct the conditions which impede the level of comfort needed for the creation of a good learning environment. Equally important, these renovations proposed by the KCMSD, unlike those contained in the State's plan, will make the KCMSD visually attractive and reasonably comparable to the suburban Kansas City, Missouri schools (testimony of Dr. Hunter, D. Osbourn, C. Eppes). The remedy proposed by the KCMSD is not a "patch and repair" approach, but rather a comprehensive plan to restore KCMSD school facilities to an environment in which children can learn. The Court finds that the capital improvements proposed by the KCMSD to eliminate health and safety hazards and to improve the visual attractiveness and comfort level of the KCMSD schools are necessary and that their costs are reasonable.

The remaining portions of KCMSD's long-range capital improvement plan primarily consist of the expansion of existing facilities and the construction of new facilities. Before addressing these specific proposals, the Court must first review the enrollment projections on which KCMSD's long-range capital improvement plan is based.

The Court acknowledges that it is very difficult to predict what the enrollment will be in the KCMSD over the next ten years. Student enrollment in the KCMSD declined from 70,756 students in 1970-71 to 39,078 students in 1980-81 (KCMSD Exh. 19). Enrollment has continued to decline since 1980-81 but at a lesser rate with signs of a leveling off. If approved, the KCMSD long-range capital improvement plan will produce capacity for 44,890 by 1995, with a capacity of 22,183 in the elementary schools, 10,499 in the middle schools, and 12,210 in the high schools (testimony of Dr. Hunter, KCMSD Exhs. 13, 14 and 15). This plan provides capacity for an enrollment greater than the enrollments projected by the State of Missouri and the KCMSD using the cohort survival method which is based on the presumption that past enrollment trends will continue (state Exh. 19, KCMSD Exh. 24 at Tab A, Appendix 1, Table 26). However, the Court finds that the long-range capital improvement plan should not be based upon this presumption because it is very likely that enrollment in the KCMSD will increase due to the court-ordered upgrading of the regular school curriculum, the implementation of the long-range magnet school plan, and the improvements in capital facilities which have been completed and which will be made as a result of this order.

Because of the inadequacy of the cohort survival enrollment projection, Dr. Hunter, the educational expert who developed the long-range capital improvement plan, requested the Mid-America Regional Council to estimate the future enrollment of the KCMSD using a "capture rate" analysis. The capture rate is simply the percentage of students who live in the KCMSD who

actually attend KCMSD schools. The study concluded that if the capture rate attained by the KCMSD in 1970 were reachieved in 1995, the student population would total 47,898 (testimony of Dr. Hunter, KCMSD Exh. 24 at Tab A. KCMSD Exh. 19). The Court finds that this estimate is more accurate than that calculated using the cohort survival method and yet KCMSD's plan is conservative because it does not provide for all the capacity necessary to accommodate a 1995 enrollment based on the 1970 capture rate. Therefore, the Court finds that KCMSD's long-range capital improvement plan is based upon appropriate enrollment projections and will now address the expansions and new construction proposed in the plan.

KCMSD's proposal provides funds for the expansion of certain classrooms, learning resource centers, cafeterias, art and music rooms, and administrative areas. Dr. Hunter testified that these facilities were deficient in size and prepared specifications for standard facilities needed to house adequate educational programs (KCMSD Exhs. 2, 3 and 4). His recommendations are comparable to those made by the Missouri State Department of Elementary and Secondary Education (KCMSD Exh. 11). Furthermore, Dr. Hunter's recommendations were made only after he had visited each of the KCMSD schools and eleven of the suburban schools (testimony of Dr. Hunter). The Court finds that the expansion of these facilities is necessary to provide a good learning environment and that the costs of such expenditures are reasonable.

KCMSD's proposal also includes funding for the construction of specialized facilities needed for implementation of the long-range magnet school plan approved by the Court. Phale Hale, a magnet school expert who coauthored the long-range magnet school plan approved by the Court, developed the facilities requirements for the long-range magnet school plan (KCMSD Exh. 5). These improvements are in addition to the approximately $53,000,000 in capital improvements approved by the

Court for the schools scheduled to become magnets in 1987. The magnet school plan is crucial to the success of the Court's total desegregation plan and the KCMSD cannot effectively implement the magnet programs without special facilities. The question before the Court is whether the improvements proposed are necessary to carry out the magnet programs approved by the Court.

One example is the Kansas City Technical Center, a four year vocational and technical magnet high school which is designed to prepare students upon graduation to either enter college, obtain entry level employment, or both. This magnet will offer programs ranging from heating and air conditioning to cosmetology to robotics. Consequently, these programs require special equipment and spacious work areas in which to instruct the students. The estimated cost for Kansas City Tech is $13,278,603, which also includes funds for an expanded cafeteria, athletic facilities, and other facilities essential for the operation of a regular high school. The Court finds that all of the facilities proposed for the Kansas City Technical Center and all the special facilities requested for the other magnet programs are necessary to implement the long-range plan and that the estimated costs of these additional facilities are reasonable.

The long-range capital improvement plan also calls for the closure of eighteen KCMSD school facilities, 15 of which are currently operating as schools, and the construction of seventeen new schools, the last of which is a new middle school III scheduled for completion by the fall of 1993. The criteria used by the KCMSD to determine whether to renovate a school or build a new facility was that buildings with renovation costs of $45 per square foot or more should be replaced (testimony of Dr. Hunter). The estimated cost of construction of the new schools ranges from $61.80 per square foot for middle schools I and III to $95.70 per square foot for the new Attucks Elementary School. Both the architects for the KCMSD and the State of

Missouri stated that buildings with renovation costs of more than 50% of the cost of new construction are candidates for replacement (testimony of D. Osbourn, D. Pearce).

The most expensive of the proposed new constructions is Paseo High School at an estimated cost of $13,991,375, excluding architectural fees and inflation (KCMSD Exh. 15). The renovation of the existing facility which includes the addition of special magnet facilities would cost an estimated $8,033,100 (KCMSD Exh. 15). The Court finds that it would be imprudent to renovate Paseo High School rather than build a new facility because both the architects for the KCMSD and the State stated that Paseo High School is near the end of its useful life (testimony of D. Osbourn, D. Pearce). In addition, it is essential to the success of the magnet school plan that Paseo High School be one of the most attractive magnet programs because it is located in an area which is considered difficult to desegregate (testimony of Dr. Hunter). Therefore, the Court approves the construction of a new Paseo High School and the sixteen other new facilities proposed in the long-range capital improvement plan. However, the Court approves funding of only those facilities scheduled for completion by the fall of 1990, and reserves final judgment on the remaining schools until a time when more current enrollment figures are available.

The Court also approves the closure of Attucks, Faxon, Gladstone, Greenwood, Holmes, Knots, Kumpf, Manchester, Pershing, Pitcher, Switser, Thatcher, Willard, Woodland, Linwood West, and Norman Elementary Schools. The Court will not establish closing dates at this time so that these schools may be used to house students while other facilities are being renovated or constructed under the long-range capital improvement plan.

KCMSD's plan also requests funding for the renovation of East Stadium, Southeast High Stadium and Arena, the Norman Administrative Center, Linwood, and Linwood West. The Court

finds that these additional facilities are in need of renovation but finds that the 8% amount allotted for architectural and engineering fees, which is included in the total cost of their renovation, is excessive. The State's expert David Pearce testified that 6% is a customary architectural fee in school capital improvement projects. Therefore, the Court approves these renovations but in a lesser amount to reflect architectural fees of 6%. Similarly, the Court will only approve a 6% architectural fee for all the other renovations and new constructions approved by the Court as part of the long-range capital improvement plan.

In addition, the KCMSD did not present any evidence regarding its request for a furniture budget for schools to be removed under the plan and for schools previously renovated. The Court simply cannot consider such requests without knowing the quantity and quality of the furniture that is presently available in the KCMSD.

The KCMSD has adjusted the estimated costs of its long-range capital improvement plan by 5% a year to reflect inflation. The Court finds that this percentage is reasonable and will apply it to the estimated costs of the plan as modified by this Court.

Finally, the KCMSD has also requested funding for a project management team which would oversee the implementation of the long-range capital improvement plan. The team, a joint venture of J.E. Dunn Construction Company and the Allied Companies, would utilize the architects, engineers and other specialists from these four firms in acting as KCMSD's agent in supervising the architects and contractors who are hired to perform the renovations and new construction set forth in the plan. In addition, the project management team will provide other professional services including project scheduling, cost control, quality control, and site selection (testimony of Robert Barrett, KCMSD Exh. 22). The KCMSD has negotiated a contract, pending this Court's approval, with this project management team which provides that the team will receive compen-

sation of $12,750,000 or 4% of the total capital improvements program expenditures for phases IV through VIII of the capital improvements program, whichever is less (KCMSD Exh. 22).

The Court finds that it is not feasible for the KCMSD to manage internally a program of the magnitude of the proposed long-range capital improvement plan. It is essential that the renovations and construction are completed on schedule and at costs within the budget approved by the Court. The Court finds that the project management team is necessary to effectively implement the plan and the Court is confident that the team will effect cost savings considerably more than the cost of the project management team. Accordingly, the Court approves the contract entered into between the KCMSD and the project management team (KCMSD Exh. 22) but approves the budget for the supervision and planning for only the first three years of the long-range capital improvement plan.

For the reasons set forth, the Court approves KCMSD's long-range capital improvement plan as modified in this order and orders the funding of those projects scheduled for completion by the fall of 1990 in accordance with Attachment A.

The plan approved by the Court does not include costs of acquiring or preparing sites for the new facilities. In addition, the Court acknowledges that the KCMSD will incur additional costs in relocating students while the approved capital improvements are completed. Accordingly, KCMSD is directed to submit these costs to the Court for approval and funding as son as they become known.

The total amount of funding approved by the Court for those projects scheduled for completion by the fall of 1990 is $187,450,334. The State of Missouri and the KCMSD are jointly and severally liable for this amount with contribution between the two constitutional violators to be $93,725,167 each.

These capital improvements will have a service life of at least 30 to 50 years and the KCMSD will continue to benefit from them long after the hopeful success of the desegregation plan has been realized. For this reason the Court departs from the 3 to 1 apportionment generally set forth in previous remedial orders.

KCMSD'S 1987-88 MAGNET SCHOOL TRANSPORTATION PLAN

Also before the Court is KCMSD's motion for approval and funding of the 1987-88 incremental transportation costs attributable to the long-range magnet school plan ordered by the Court. KCMSD states that in 1986-87 it expended $1.4 Million to transport students to the three magnet programs at the Lincoln College Preparatory, the Southwest Cluster, and the Westport Community Applied Learning Magnet. KCMSD projects that the implementation of the 13 new magnet programs in 1987-88 will increase the total transportation costs for the magnet schools to $4,490,836. However, approximately $2.2 Million of this amount represents the cost that would have been incurred in operating traditional transportation routes at these schools even if there had been no magnet school program. Thus, KCMSD requests the Court to order the State to pay 75% of the remaining $2,294,075 cost of transportation required by the magnet program.

In response, the State requests that the plan be denied in its entirety or in the alternative that a hearing should be held at a future date to allow adequate discovery as to how and by whom the plan was developed and whether it is adequate and cost effective. As stated earlier, the parties should confer and see if they can reach an agreement on a plan. If needed, the parties may engage in discovery and if necessary a hearing will be held during the week of December 14, 1987. The KCMSD may implement the plan if it desires with the understanding that the Court has not approved the plan or ordered the State to fund any

portion of the plan over and above the regular State aid under the standard formula.

KCMSD'S MOTION FOR FUNDING RELIEF

In its order of July 6, 1987, the Court deferred ruling on KCMSD's motion for funding relief until after the Court had ruled on the long-range capital improvement plan. The Court did so because it wanted an accurate estimate of not only KCMSD's deficit through fiscal year 1987-88, but also KCMSD's financial obligations under the overall desegregation plan through 1991-92.

Before setting forth the financial obligations of the KCMSD under the remedial plan, the Court must correct its order of July 6, 1987 which approved the year 3 desegregation budget. The Court, pursuant to the request of the KCMSD, included the 1987-88 implementation cost of the long-range magnet school plan in the 1987-88 desegregation budget. The total implementation cost for the 1987-88 magnets is $17,137,993, of which $13,946,729 was previously approved by the Court in its order of November 12,1986. In that previous order, the Court found the State of Missouri and the KCMSD jointly and severally liable for $8,908,406 of this amount, with the State solely liable for $5,038,323. This apportionment of liability for the $13,946,729 remains unchanged as will the Court's apportionment for the remaining implementation costs approved in the November 12, 1986 order. While the Court's apportionment for the KCMSD is more than 25% in year 1987-88 under the November 12, 1986 order, the percentage of liability of the implementation costs decreases to approximately 13% in 1991-92 under the plan. The KCMSD's total portion of the implementation costs and capital expenditures for the long-range magnet school plan approved in the November 12, 1986 order is approximately 25%, and thus is consistent with the Court's previous orders.

Therefore, in determining KCMSD's contribution to the year 3 desegregation budget, the Court mistakenly applied 25% to the entire 1987-88 implementation cost of the long-range magnets when the liability for $13,946,729 of that amount had already been apportioned. The 25% should only have been applied to the $3,191,264 in additional magnet base costs that the Court approved in its July 6, 1987 order. Therefore, the Court corrects page 12 of the order to reflect the following apportionment:

1987-88 Desegregation Budget

	Total	KCMSD'S Contribution	State's Contribution
Public Information	30,000.00	7,500.00	22,500.00
Desegregation Monitoring Office	-0-		
Program Evaluation	-0-		
Desegregation Monitoring Committee	256,228.00	64,057.00	192,171.00
Effective Schools	6,555,000.00	1,638,750.00	4,916,250.00
Reduction in Class Sizes Total	8,450,135.00	2,112,534.00	6,337,601.00
Summer School	1,295,764.00	323,941.00	971,823.00
Full Day Kindergarten	1,826,964.00	456,741.00	1,370,223.00
Before and After School Tutoring	233,759.00	58,440.00	175,319.00
Early Childhood Education	3,102,178.00	775,545.00	2,326,633.00
Long-Range Magnet School Plans	17,137,993.00	5,252,019.00	11,885,974.00
1986-87 Magnets	12,257,529.00	3,064,383.00	9,193,147.00
AAA Achievement	6,340,614.00	1,585,154.00	4,755,460.00
SWAS, DRP and STEPS	-0-		
Facilities Improvements (interest)	353,061.00	88,265.00	264,796.00
Totals	57,839,225.00	15,427,329.00	$42,411,897.00

In calculating the financial obligations of the KCMSD under the Court's overall plan for which the district lacks funding, the Court finds that the KCMSD suffered a deficit of $1,092,365 in 1986-87 in implementing the long-range magnet school plan based on its obligation of $4,158,136 and expenditures of $3,065,771. In addition, the Court approved a total of $60,234,436 in capital improvements for the long-range magnet plan in its orders of November 12, 1986 and April 29, 1987, with KCMSD's share set at $30,117,218. KCMSD has currently expended $3,027,413 for these improvements in 1986-87 but is without revenues to fund the balance of its share of these capital improvements, or $27,089,805.

For fiscal year 1987-88, KCMSD projects an operating budget of $121,342,253 and total revenues of $110,558,418, creating a deficit of $10,783,835. Included in the operating budget is approximately $7.15 Million for additional teachers and for salary increases for present teachers, $2,240,000 for facilities maintenance, and $869,189 for special education students. The AFT 691 has moved the Court to order a teacher's salary schedule larger than that included in the KCMSD 1987-88 operating budget.

The Court finds that the KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program. *Bradley* v. *Milliken*, 540 F.2d 229, 245 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977), *citing Hart* v. *Community School of Brooklyn*, 383 F.Supp. 699, 741 (E.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). Therefore, it is essential that the KCMSD have sufficient revenues to fund an operating budget which can provide quality education, including a high quality faculty. The Court is quite aware that the KCMSD's teacher salary position, in comparison with the surrounding school districts, has deteriorated significantly because of KCMSD's failure to obtain passage of a tax levy to fund teacher salary raises. Consequently,

KCMSD's ability to attract new teachers and retain present teachers has been restricted. While the revised salary schedule proposed by the KCMSD would not equal those in suburban districts, it will certainly make the KCMSD more attractive to new teachers and more pleasing to its present teachers. As stated at the beginning of the order, the Court will not order either of the salary proposals submitted by the KCMSD and AFT 691 because this decision properly lies within the discretion of the school board. However, the Court will provide KCMSD with revenues of $7.147 Million per fiscal year through 1991-92 to fund teacher salary increases, and revenues of $3,109,189 per year to fund the costs of facilities maintenance and special education students.

The KCMSD is also without resources to finance its portion of the 1987-88 desegregation budget, $15,427,329, which includes the 1987-88 implementation cost of the long-range magnet school plan. In addition, the KCMSD is without the funds to pay its proposed share of the 1987-88 transportation costs of the magnet plan, estimated by it to be $573,518. KCMSD is also obligated in 1987-88 to fund $6,069,801 in capital improvements pursuant to the long-range capital improvement plan approved by the Court. Finally, the Court estimates that site selection and student relocation costs associated with the long-range capital improvement plan will be approximately $4 Million per year, with KCMSD's portion to be $2 Million per year (affidavit of Roger Gaunt). In summation, the KCMSD has financial obligations under the Court's overall desegregation plan for 1986-87 and 1987-88 of $62,509,653 for which it lacks resources to fund.

In fiscal year 1988-89, the KCMSD is obligated to fund an estimated $4,454,203 for implementation of the long-range magnet school plan and $27,399,873 in capital improvements pursuant to the long-range capital improvement plan. The Court projects that KCMSD's portion of the magnet school transpor-

tation costs for each of the next four fiscal years will be $573,518. The Court also projects that the KCMSD will have an operating budget deficit of $10,256,835 for fiscal years 1988-89 through 1991-92 due to expenditures needed for teacher salary increases, facilities maintenance, and special education students. In addition, the Court estimates that the 1988-89, 1989-90, 1990-91, and 1991-92 desegregation budgets at approximately $44,000,000 per fiscal year, excluding the long-range magnet costs approved by the Court in its November 12, 1986 order, because of the continuing cost of the remedial programs previously ordered by the Court. Therefore, the Court finds that the KCMSD will experience a deficit of approximately $11,000,000, or 25% of the desegregation budget, in each of those fiscal years. In summation, the Court projects a total deficit of $53,684,429 for the KCMSD for 1988-89.

Similarly in 1989-90, the Court projects that the KCMSD will experience a deficit of $5,027,721 in long-range magnet costs, $63,555,647 in capital improvement costs, $10,256,835 in operating budget, and $11,000,000 in desegregation budget, totaling $89,840,203. Using the same method of calculation, the projected deficits for years 1990-91, and 1991-92 are $42,543,837 and $33,823,793 respectively, bringing the total deficit to $282,401,915. A summary of the KCMSD's known and projected obligations through 1991-92 under the Court's desegregation plan is set forth in Attachment B.

In its motion for funding relief, the KCMSD requested the Court to enjoin the rollback in the real estate tax levy otherwise required under Proposition C (R.S. Mo. § 163.050 and 164.013). The KCMSD also requested the Court to order the State of Missouri to advance to it funds for its desegregation and operation expenses that it is unable to fund. The KCMSD would then repay the State when resources were available.

The Court will not require the State of Missouri to fund any of KCMSD's financial obligations under the court-ordered desegregation programs. However, the United States Court of Appeals for the Eighth Circuit stated clearly that the desegregation remedy ordered by this Court shall be fully funded. *Jenkins* v. *State of Missouri*, 807 F.2d 657, 686 (8th Cir. 1986), and has discussed in detail the procedure the district court is to follow in achieving this goal. *Liddell* v. *State of Missouri*, 731 F.2d 1294, 1319-23 (8th Cir. 1984).

The record clearly shows that the KCMSD is unable with its present resources to raise revenues to fund its share of the costs assessed under the desegregation orders. The KCMSD has exhausted all available means of raising additional revenue, including presenting a bond issue in 1987 and tax levy increase proposals to the voters in four separate elections in 1986 and 1987. The KCMSD has not had a bond passage or a levy increase since 1969. As a result, its physical facilities have literally rotted.

Because of KCMSD's inability to raise additional funds under the present system, the Court encouraged the Missouri General Assembly to "explore the possibility of enacting legislation that would permit a district involved in a desegregation plan more versatility than it presently has to raise funds with which to support the program." November 12, 1986 Order at p. 7. Such legislation was introduced but was received unfavorably and ultimately failed. In addition, the State of Missouri and the KCMSD have been unable to agree on an alternate method of raising KCMSD's share of the desegregation costs. Therefore, the Court has explored all the alternatives set forth by the Eighth Circuit and is left with no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan and therefore insure that the constitutional violations committed by the KCMSD and the State of Missouri are cured.

The United States Court of Appeals for the Eighth Circuit has stated that such relief may only be granted after the Court has

conducted an evidentiary hearing. *Liddell* v. *State of Missouri*, 731 F.2d 1294, 1323 (8th Cir. 1984). However, the plaintiffs, the KCMSD, and the State of Missouri have stated that they do not request an evidentiary hearing on this issue, and consent to the Court's entry of a judgment based on the record developed in this case.

A district court's broad equitable power to remedy the evils of segregation includes the power to order tax increases and bond issuances. *Liddell* v. *State of Missouri*, 731 F.2d at 1322. The United States Supreme Court has stated that a tax may be increased if "necessary to raise funds adequate to . . . operate and maintain without racial discrimination a public school system." *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 233, 84 S.Ct. 1226, 12 L.Ed.2d 256 (1964).

A studied estimate of the additional revenues needed by the KCMSD to meet its share of the desegregation costs during the next five years reveals the sum of approximately $150,000,000 for capital improvements and $135,000,000 for other desegregation costs.

In its order of June 14, 1985, this Court stated that it was reluctant to take any action to increase taxes. The Court now affirms the statement made in its order of August 25, 1986 that it is not insensitive to the fact that those patrons of the KCMSD who voted in previous elections have refused to approve a tax levy increase and a bond issue. However, a majority has no right to deny others the constitutional guarantees to which they are entitled. This Court, having found that vestiges of unconstitutional discrimination still exist in the KCMSD, is not so callous as to accept the proposition that it is helpless to enforce a remedy to correct the past violations. Failure of the KCMSD to come forward with its share of funds to implement the remedial plan would certainly operate to hinder vindication of federal constitutional guarantees to which the school children in the KCMSD are entitled. This Court cannot shrink its sworn duty to uphold the Constitution of the United States (p. 4). The Court must weigh the constitutional rights of the taxpayers against the

constitutional rights of plaintiff students in this case. The Court is of the opinion that the balance is clearly in favor of the students who are helpless without the aid of this Court.

The Court is of the firm conclusion that it has no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan. At the Court's request the parties have submitted estimates on revenues which would be generated through various tax measures.

The plaintiffs have moved the Court to require KCMSD to issue $144,175,000 in general obligation bonds, to add a $1.73 property tax levy in the KCMSD, and to impose a 1/2% sales tax effective January 1, 1989 within the KCMSD to permit KCMSD to fund its share of the costs of the desegregation orders.

During the hearing on the liability issue in this case there was an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to integrate its schools but continue to be employed in the district. After careful consideration, the Court has determined that it would be equitable to involve these people in a plan to help defray the district's desegregation expense.

The Court will impose a 1.5% increase as a surcharge on the Missouri State Income Tax (raising the present rate on individuals from 6% to 7.5%) on residents and nonresidents of the KCMSD, including business associations, partnerships and corporations who earn salaries, wages, commissions and all other compensation and income subject to the Missouri State Income Tax for work done, services rendered and business or other activities conducted within the KCMSD. This surcharge shall become effective for all income earned after September 25, 1987. All employers and persons presently legally responsible for withholding the Missouri State Income Tax shall have the same responsibility for withholding the 1.5% increase. The State through its Department of Revenue shall collect the in-

creased tax and remit it to the KCMSD within thirty days after its receipt of same. KCMSD shall promptly prepare and publish a legal notice of this income tax increase (surcharge) giving notice to all employers within the district and to all persons and entities who receive an income for activities performed within the district.

Revenue generated by the income tax surcharge shall be used to retire capital improvement bonds which are herein authorized. It is anticipated that the surcharge will create sufficient revenue for the KCMSD to meet its portion of the cost of the capital improvement plan. The surcharge shall remain in effect until such time as the bonds are retired or until other provisions are adopted to insure their retirement.

The KCMSD presently has a tax levy of $2.05 per $100.00 assessed valuation. This is much less than the tax levy of any neighboring school district. In order to fund the other desegregation costs other than capital improvements for which it is obligated the district needs approximately $27,000,000 additional per year through the 1991-92 school year. A property tax increase of $1.95 per $100 assessed valuation would generate about $27,000,000 annually. Therefore, the Court will order the property tax levy to be increased to $4.00 per $100 assessed valuation through the 1991-92 fiscal year.

The KCMSD is directed to issue capital improvement bonds in the total amount of $150,000,000 to be retired within 20 years from the date of issue. The board is authorized to issue credit enhanced leasehold revenue bonds and general obligation bonds in such proportion as the school board, in its discretion, determines to be most advantageous to the district.

In accordance with the foregoing memorandum, it is

ORDERED that the motion of the KCMSD for the approval of its capital improvement plan is approved as modified herein; and it is further

ORDERED that the motion of the KCMSD for approval of its student transportation plan for the long-range magnet school plan is deferred and if a hearing is necessary on the plan it is set to commence on Monday, December 14, 1987 at 9:00 a.m.; and it is further

ORDERED that the motion of AFT 691 for alternate funding relief regarding the salaries of the KCMSD teachers is denied; and it is further

ORDERED that the motion of KCMSD for funding relief is granted in part in that it is ordered that in order to fund the obligation of the KCMSD for the desegregation program, a surtax of 1.5% is added to the Missouri State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and the tax levy for the KCMSD is raised to $4.00 per $100 assessed valuation; and it is further

ORDERED that said increased revenue shall be applied to satisfy the obligations of the KCMSD as set forth in this memorandum.

/s/ Russell G. Clark
RUSSELL G. CLARK,
DISTRICT JUDGE
UNITED STATES
DISTRICT COURT

Dated: September 15, 1987

ATTACHMENT A

Long Range Capital Improvement Plan Funding Order (1987-90)

Construction Phase (Date of Completion)	Work Required	Cost
Phase V		
Southeast Annex (Fall, 1988)	R	$888,087
Longfellow (Fall, 1988)	MI	352,110
Melcher (Fall, 1988)	MI	1,393,680
Meservey (Fall, 1988)	MI	395,600
N. Rock Creek/Korte (Fall, 1988)	MI	1,751,403
		154,011
Phillips (Fall, 1988)	MI	445,200
Southwest Senior High (Fall, 1989)	MI-R	8,882,817
New Faxon Elementary (Fall, 1989)	NC	3,946,460
Phase VI		
New Knotts Elementary (Fall, 1989)	NC	4,020,620
New Attucks Elementary (Fall, 1989)	NC	4,031,300
King Middle (Fall, 1989)	MI-R	828,639
New Pitcher Elementary (Fall, 1988)	NC	5,527,010
New Northeast Elementary (Fall, 1989)	NC	4.580,000
New Southeast I Elementary (Fall, 1989)	NC	5,621,000
Nowlin Middle (Fall, 1989)	MI	2,484,290
Paseo High (Fall, 1990)	NC	13,991,375
Three Trails (Fall 1989)	MI	1,119,773
K.C. Tech (Fall, 1990)	MI-R	13,278,603
Troost (Fall, 1989)	MI-R	2,283,073
Wheatley (Fall, 1989)	MI	1,265,154
Middle School I (Spring, 1990)		6,705,000

Garfield (Fall, 1989)	MI-R	3,899,110
Weeks (Fall, 1989)	MI-R	645,300
Phase VII		
New Southeast II Elementary (Fall, 1990)	NC	4,545,000
New Southeast III Elementary (Fall, 1990)	NC	5,530,500
New Elementary I (Fall, 1990)	NC	4,427,000
New Elementary II (Fall, 1990)	NC	3,870,000
New Elementary III (Fall, 1990)	NC	3,870,000
East High (Fall, 1990)	MI-R	6,706,704
Northeast Middle (Fall, 1990)	MI-R	6,899,162
Richardson (Fall, 1990)	MI-R	1,250,645
Southeast High (Fall, 1990)	MI-R	6,128,250
Van Horn High (Fall, 1990)	MI-R	5,868,580
Westport Middle (Fall, 1990)	MI-R	4,766,303
Westport High (Fall, 1990)	MI-R	6,759,951
Meservey (Fall, 1990)	R	732,103
Phase VII (other facilities)		
East Stadium (Fall, 1990)	R	401,020
Southeast High - Stadium and Arena (Fall, 1990)	R	438,320
Linwood (Fall, 1990)	R	792,984
Linwood West (Office Space) (Fall, 1990)	R	970,122
Norman Administrative Center (Fall, 1990)	R	3.062.057
		$155,468,316 Total Cost
		9,328,098 Architect Fees
		21,254,230 Inflation
		1,399,690 Construction Planning 1987-90
		$187,450,884 Total Projected Cost

Key: R - Renovation
MI - Magnet Improvement
NC - New Construction

ATTACHMENT B

	1986-88	1988-89	1989-90	1990-91	1991-92	TOTAL 1986-92
CAPITAL IMPROVEMENTS	33,159,606	25,399,873	61,555,647	14,259,281	5,539,237	139,913,644
Projected Costs of Site Selection/ Student Relocation associated with the Long-Range Capital Plan	2,000,000	2,000,000	2,000,000	2,000,000	2,000,000	10,000,000
Subtotal	35,159,606	27,399,873	63,555,647	16,259,281	7,539,237	149,913,644
DESEGREGATION EXPENSES						
Desegregation Budget Deficit	16,519,694	11,000,000	11,000,000	11,000,000	11,000,000	60,519,694
Projected Magnet Transportatin Costs	573,518	573,518	573,518	573,518	573,518	2,867,590
Magnet Implementation Costs	included in Deseg. Bud. Deficit	4,454,203	4,454,203	4,454,203	4,454,203	17,816,812
Subtotal	17,093,212	16,027,721	16,027,721	16,027,721	16,027,721	81,204,096
OPERATING BUDGET DEFICIT						
Teacher Salary Package	7,147,646	7,147,646	7,147,646	7,147,646	7,147,646	35,738,230
Maintenance	2,240,000	2,240,000	2,240,000	2,240,000	2,240,000	11,200,000
Special Edication Students	869,189	869,189	869,189	869,189	869,189	4,345,945
Subtotal	10,256,835	10,256,835	10,256,835	10,256,835	10,256,835	51,284,175
TOTAL	62,509,653	53,684,429	89,840,203	42,543,837	33,823,793	282,401,915

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed July 25, 1988]

On May 31, June 1, and June 2, 1988, the Court conducted a hearing on KCMSD's motion for approval of the desegregation budget for years 4 through 6 of the desegregation plan. Plaintiffs also moved for the approval of three additional programs for year 4. In addition, the parties filed lengthy post-trial briefs in support and in opposition to the submitted budgets. Based upon the evidence presented at the hearing and the post-trial briefs, the Court will approve a modified budget for years 4 through 6 of the desegregation plan as set forth in this order.

District Communications

The Court has approved a public information budget of $30,000 for each of the first years of the desegregation plan. The KCMSD requests funding of $30,350 for 1988-89, and $30,725 for 1989-90, the slight increases needed for additional supplies. The Court finds that these costs are reasonable and approves the submitted budgets for years 1988-89 and 1989-90. The KCMSD requests funding of $45,077 for year 1990-91, $13,952 of which is for salaries for three student interns who would work in the

communications office in conjunction with the Westport Communications Magnet that is scheduled to open in the fall of 1990. This program is similar to the traditional COE programs available to KCMSD high school students except that the proposed interns would be paid by the KCMSD out of desegregation funds, rather than by a local business. The Court finds that the internship program is simply not a necessary cost of the district communications office and thus will not be approved. As a result, the Court approves a budget for 1990-91 of $31,125, which includes a slight increase for additional supplies.

Research and Evaluation

The KCMSD requests funding of $89,980 in 1988-89 for the purchase of a new computer system to evaluate the court-ordered desegregation programs. Dr. Paul Holmes, KCMSD director of research, evaluation and testing, testified that the data generated for the evaluation of the magnet schools and the other desegregation programs exceeds the memory capacity of the current system that he described as "two generations old." The evaluation of the magnet schools and the other desegregation programs is essential to the success of the plan and the Court finds that a new computer system is necessary and that the submitted costs are reasonable. The State maintains that should the Court approve the purchase of the new system, that only the incremental cost attributable to evaluating the desegregation programs should be funded by the desegregation budget. The Court finds that it is the court-ordered desegregation programs, particularly the large number of magnet schools that are coming on line, that have created the need for the new equipment and therefore that the total cost of the system is properly a desegregation cost. The KCMSD has also requested funding of $5,060 and $5,414 for years 1989-90 and 1990-91, respectively, for an equipment maintenance contract and purchase of computer software. The Court finds that these expenditures are necessary and their cost reasonable and approves them as part of the desegregation budget for those years.

Staff Development/Human Relations

The KCMSD has requested funding for $482,955 in 1988-89, $466,885 in 1989-90 and $280,309 in 1990-91 for an extensive staff development/human relations program. The Court had approved $500,000 for staff development in year 1 of the desegregation plan. The present proposal actually consists of two components, human relations for desegregation, and improvement of student achievement. The human relations staff development program is intended to assist all staff members, including teachers, administrators, custodians, etc. in promoting and understanding cultural diversity, reducing bias, racism, and discrimination, improving interracial interaction, enhancing discipline and classroom management techniques in multi-cultural settings, and enhancing academic achievement of all students in a desegregation setting. The Court is well aware that there are inherent problems when teachers, students, custodians, etc. of varying races are placed together in an educational setting for the first time. However, the Court finds that the approximate $1.25 Million proposed for the human relations component is not a necessary cost of the desegregation plan. The Court encourages teachers, administrators and other KCMSD personnel who face these problems to seek the advice and counsel of fellow staff members who have experience in dealing with those situations.

The other component of the proposed staff development/human relations program, improvement of student achievement, is intended to educate teachers and administrators on how to prepare their students to take standardized tests. The Court firmly believes that the money proposed for this program is better spent in improving the student's knowledge of the subject areas tested on such examinations, and not on techniques of taking the examinations. For these reasons, the Court denies KCMSD's motion for approval of the staff development/human relations program as part of the desegregation plan for years 1988-89, 1989-90, and 1990-91.

Administrative Reorganization

On March 8, 1988, the Board of Directors of the KCMSD approved Superintendent George F. Garcia's proposed reorganization of the administrative structure of the KCMSD. Dr. Garcia testified that the prior structure was really composed of two administrations, one for the magnet schools and one for the traditional schools. He testified that the new organization avoids duplication and will more effectively administer the Court's desegregation programs as well as the traditional school programs. The KCMSD requests the Court to approve a total of $472,487, which is 70% of the cost of the reorganization, as part of the desegregation budget for years 4 through 6 of the desegregation plan. The Court defers to Dr. Garcia's decision to reorganize the administration of the KCMSD and believes that the new organization will more effectively administrate the education provided in the KCMSD. However, it is clear that the reorganization was done not only to provide more effective implementation of the desegregation programs, but also the traditional school programs. The KCMSD has simply not shown the Court that the submitted costs relate solely to the administration of the desegregation programs and thus the Court will not approve the additional funds over the extensive funding already approved in the long-range magnet school plan for administration purposes.

Interest Payments

In its order of June 14, 1985, the Court required KCMSD to contribute $10,000,000 and the State $27,000,00 for initial capital improvements to KCMSD facilities. The KCMSD requests the Court to approve the interest costs it has accrued and will accrue in obtaining the $10,000,000 for years 1988-89, 1989-90, and 1990-91. In its order of July 6, 1987, the Court found that these interest costs were properly desegregation expenditures and recognized the estimated interest costs for 1987-88 of $353,061 as a desegregation expense. However, in

its determination of the contributions to be made by the KCMSD and the State, the Court mistakenly included the estimated amount of 1987-88 in the total desegregation budget for year 1987-88. The State should not have been required to contribute $264,796 of this interest amount and will be given a credit in that amount on its desegregation obligation for year 1988-89. The KCMSD also asserts that its actual interest cost for 1987-88 was $957,699, or $604,638 more than its original estimate. The Court will recognize this additional cost as a KCMSD desegregation expense. The KCMSD assures the Court that the 1989-90 and 1990-91 estimated interest costs are maximum costs. As a result, the Court approves as a KCMSD desegregation expense $1,488,668 for year 1988-89, $838,380 for year 1989-90, and $788,067.50 for year 1990-91. The State is not required to contribute any of these amounts.

Desegregation Monitoring Committee

The Desegregation Monitoring Committee is an arm of this Court and has shown itself to be an effective and impartial group committed to achieving the goals outlined in this Court's plan. The budget for the monitoring office will be increased from its present level of $256,228 to $266,854. This net increase of $10,626.72 results from a reduction in the research budget of $31,991, an $8,800 increase in per diem payments, a $7,593.72 increase in the operating budget, the addition of a financial specialist who will be responsible for tracking budgets as related to capital improvements and other desegregation program components, and a 5.5% increase in salary and benefits for the executive secretary and administrative assistant. The Court approves the DMC's request for a transfer of $15,000 from the balance of the research budget for 1987-88 to the staff compensation budget for partial funding of the financial specialist in 1988-89. The Court also notes that the per diem increase is based upon an increase in the number of compensable hours to 110 hours for committee members, to 125 hours for committee chairpersons, and to 150 hours for the general chairperson.

In addition, the DMC has informed the Court that there is a balance in the per diem account for year 1987-88 and requests permission to compensate committee members who have exceeded their compensable number of hours from the remaining funds in this account. The Court authorizes such payments and orders that any remaining balance after these additional payments are made should be carried over to the 1988-89 per diem budget.

IMPROVING STUDENT ACHIEVEMENT

Effective Schools

The KCMSD has proposed a budget of $6,680,000 for the effective schools program for 1988-89, an increase of $125,000 over 1987-88. The KCMSD also requests funding of $7,300,000 for 1989-90, and $7,500,00 for year 1990-91. The State opposes the requested funding on the ground that the "effective schools program has not been demonstrated to be achieving its intended purpose." State's Post-trial Memorandum at p. 64. The Court finds that the State's position is without merit.

This Court, in *Jenkins* v. *Missouri*, 639 F.Supp. 19, 34 (W.D. Mo. 1985), stated that the effective schools funding must be spent "for the sole purpose of improving student achievement as measured by the Iowa Test of Basic Skills and the Basic Essential Skills Test (BEST)." Dr. Paul Holmes, KCMSD Director of Research, Evaluation and Testing, testified that the pass rate for KCMSD students on the BEST test has increased from 39% in 1984-85, the year before implementation of the effective school program, to 59.6% in 1987-88, the highest ever in the history of the KCMSD. Specifically, 93.6% of KCMSD students passed the reading portion of the BEST test and 73.3% passed the math portion in 1988, as opposed to 85% and 56.4% in 1985. Dr. Holmes also testified that the performance of KCMSD students on the ITBS test has shown similar improvement. In 1985, before implementation of the effective schools program, the

national norm on the ITBS was met or exceeded in only 29% of the grade level subtest comparisons. This increased to 39% in the spring of 1986 and 52% in the spring of 1987. The State does not dispute these figures but only points to an independent evaluation of the effective schools program in which only 29% of the faculty survey responded that the effective schools program made "a great or very great change" in their instruction. The Court finds that this evaluation only covered the planning during year 1985-86 and the implementation of the program in 1986-87, and despite the results of the faculty survey, the evaluation recommends continuation of the program. The Court also finds that the more pertinent information is the test scores of the KCMSD students since the implementation of the effective schools programs and the testimony of KCMSD principals and parents of KCMSD students at the hearing that the effective schools funding is essential to the operation of their particular schools. For these reasons, the Court approves the continuation of the effective schools component for 1987-88 through 1990-91.

The State also argues that if the Court continues effective schools funding that it reduce the amounts allotted to each school. The Court finds that the funding levels approved in the past are reasonable and will approve them for years 1988-89, 1989-90, and 1990-91. As a result, the Court approves funding for the effective schools program in the amount of $6,680,000 for 1988-89, $7,300,000 for 1989-90, and $7,500,000 for 1990-91.

Reduction in Class Size

The KCMSD has requested $8,787,191 for the 1988-89 cost of teachers required to meet the class size levels ordered by this Court, a $337,056 increase over 1987-88. The KCMSD has also requested funding of $9,226,551 for 1989-90 and $9,687,877 for 1990-91.

In *Jenkins* v. *Missouri*, 639 F.Supp. 19, 30 (W.D. Mo. 1985), the Court ordered that the maximum class size was to be attained by school year 1987-88 and that the total cost of the program was to be paid by the State and not to exceed $12,000,000. The State argues that through year three of the desegregation plan, it has been ordered to expend $12.3 Million Dollars on reduction of class size and therefore that it is not liable for any additional expenditures on this component. For the following reasons, the State's position is without merit.

First, the maximum class sizes were not attained in 1987-88. Secondly, at the time of the 1985 order, the KCMSD was not operating middle schools nor did its high schools have a seven period day, both of which will occur in the 1988-89 school year and both of which have an effect on the number of teachers needed to meet the requirements of the Court. Finally, the maximum class sizes must be maintained once achieved and the Court's June 14, 1985 order does not preclude the Court from ordering the State to fund a share of the maintenance.

The State also argues that the class size reduction should be based upon average rather than maximum student teacher ratios and should only be implemented at nonintegrated schools. For the reasons set forth on p. 5 of its June 6, 1987 order, the Court rejects both of these claims.

The State also argues that even using the maximum student/teacher ratios, the KCMSD has grossly exaggerated the number of teachers required to meet such ratios. The Court finds that the dispute simply is based upon differing projections of number of students who will enroll in the KCMSD over the next three years. The State assumes that no new students will enroll while the KCMSD assumes enrollment in the magnet schools up to the capacity of those buildings. The Court finds that neither is likely an accurate projection. However, the Court will approve the proposed budget for 1988-89 of $8,787,191, but will not approve the proposed increases for 1989-90 and 1990-91. The State is

protected for 1988-89 because the KCMSD is ordered to hire only the number of teachers necessary to meet the court mandated class size maximums and thus the State will pay only for its share of the teachers needed. If student enrollments justify additional funding for years 1989-90 and 1990-91, KCMSD may move the Court for such funding.

The KCMSD is directed to submit a report to the Desegregation Monitoring Committee by October 15, 1988 setting forth the actual enrollment in the KCMSD broken down by K-3, 4-5, and 6-12, and the number of teachers hired by the KCMSD under this component. The report shall also include the specific number of students in each classroom of K-5 students for the school year 1988-89.

Summer School 1988

The KCMSD has requested $1,793,397 for the summer school program in 1988. This figure consists of $1,302,571 to operate the elementary, middle, and senior high summer programs, and $506,730 for transportation for summer school programs at nine magnet schools, including the 1986-87 magnets. The magnet transportation component will be considered under the 1986-87 magnet section.

In *Jenkins* v. *Missouri*, 639 F.Supp. 19, 47-48 (W.D. Mo. 1985), the Court approved a budget for summer school 1986 of $1,196,000 which included $200,000 for transportation of a projected 3,680 students. The actual enrollment for the summer of 1986 program was 2,862. For the summer of 1987 the Court approved an additional $100,000 for transportation to meet the 1987 projected enrollment of 3,680 students. The actual enrollment in 1987 was 3,508. Despite a projected enrollment of 3,200 students for summer school 1988, the KCMSD requests $353,970 for transportation costs. It claims that the additional transportation funds are needed because in 1987 it was forced to spend $100,000 of its operating budget on transportation. Because of

the projected decrease in enrollment for 1988, the Court simply cannot approve an increase in transportation funds over the $300,000 alloted for 1987.

The State argues that the salary component of the summer 1988 budget is excessive because it is based on pupil/teacher ratios of 15 to 1 at the elementary level, 18 to 1 at the middle level, and 22 to 1 for high school summer students, all of which are less than the maximum levels set by the Court.

The Court finds that the lower pupil/teacher ratios on which the salary component of the summer school program is based are appropriate because the students in the summer program have remedial needs that will be better served in smaller classes because of the short summer session. For this reason, the Court approves the proposed salary component and approves a total summer school budget in the amount of $1,249,571 for 1988. The Court notes that this funding does not duplicate what was purportedly granted by the Desegregation Monitoring Committee. On March 31, 1988, the Desegregation Monitoring Committee approved the KCMSD's request to advance funds necessary for the implementation of the summer school program for 1988 from the funding approved for implementation of the seven day period in high schools which was not implemented as originally scheduled in 1987-88. The KCMSD is directed to reimburse the seven day period fund in the total amount advanced.

In its order of July 6, 1987, the Court directed the State to include the KCMSD summer school students in its foundation formula calculations. At the hearing, the State introduced evidence that the KCMSD's total cost for a summer school program in 1987 was $1,297,415 and that the KCMSD withdrew $945,388 from the State's program desegregation account for 1987 summer school expenditures. The State also indicated that the KCMSD would receive an additional $445,748 in foundation formula payments based upon the 1987 summer school enrollments. The KCMSD has indicated that it will credit the State's payment in the amount of $79,000 resulting in the total amount paid or to be paid by the State in desegregation funds and foundation formula payments for summer school 1987 of $1,312,136, or $14,721 more than the cost of the program. The Court had directed the State to include the summer school students in its foundation formula because it believed that this funding was for summer school expenditures that were nondesegregation costs. The KCMSD did operate an elementary summer school program prior to the desegregation plan and the Court believed that KCMSD's proposed summer school budget included only those expenditures that resulted from the desegregation order. However, it appears that the KCMSD has submitted its entire summer school costs for 1987 and 1988 as a desegregation expense. Therefore, unless the KCMSD can demonstrate that it incurred summer school costs for its 1987 program in addition to those included in its 1987 summer school budget, then the State has paid for the entire desegregation budget for summer school 1987. This was not the intent of the Court, and unless the KCMSD can make the showing specified, the State is entitled to a credit on its financial obligation for summer school 1988 of $340,313. For summer school 1988, the State is directed to include the KCMSD summer school students in its foundation formula calculations but the payments resulting from these additional students are to be applied to the State's desegregation obligation for the 1988 budget. KCMSD argues that the summer school payments based upon the foundation formula are not categorical payments but rather go into the general operating budget of the school district. The Court acknowledges this fact but finds that the result is that the State's expenditures for the summer school 1987 exceeded what was apparently the total cost of the summer school program in 1987.

Summer School 1989-91

The KCMSD has proposed a new summer school program for summers 1989, 1990, and 1991 that would be fully coordinated

with the magnet schools. In addition to offering remedial classes necessary to help students who are retained in a grade or who are falling behind, it would also offer enrichment programs that are successful in the magnet schools. The KCMSD requests $1,793,397 for the summer of 1989, $1,886,663 for the summer of 1990, and $1,992,795 for the summer of 1991 to fund these new programs. The Court finds that introducing students to the magnet courses in these programs will draw new students into the magnet schools and offer a much greater desegregation in the summer program. However, the Court finds that the budgets requested are excessive. Specifically, the Court acknowledges that teachers and principals will need to plan for the implementation of these summer programs during the preceding school year but finds that 120 paid hours per teacher is excessive and the Court will approve stipends for 30 hours per teacher. The Court also finds that the requested stipends for 200 teachers to participate in a staff development program component of the summer school program is not a necessary cost and will not be approved. The proposed half time coordinator and clerical support to coordinate the planning and implementation of the new summer school programs are approved. Finally, the Court finds that the proposed pupil student ratio of 15 to 1 for remedial classes is appropriate and is approved. However, the proposed 20 to 1 pupil-student ratio for enrichment classes is not necessary and the Court approves only the cost of teachers and teachers aides needed to obtain the maximum class sizes ordered by the Court for the enrichment component. For these reasons, the Court will approve the new summer programs as modified. The proposed budget was based on a 20 to 1 ratio which the Court does not approve; therefore, the Court is unable to approve a fixed budget because it cannot determine from the submitted budget the exact amount of the proposed stipends for planning time and the additional cost of teachers and teachers aides needed to obtain the maximum pupil teacher ratio for enrichment courses. The KCMSD is directed to submit an amended budget reflecting these modifications.

Full Day Kindergarten

The KCMSD has requested funding of $1,773,185 for 1988-89, $1,862,515 for 1989-90, and $1,956,363 for 1990-91. The budget for 1987-88 was $1,826,964. The State argues that the KCMSD has not justified the continuation of this program because it failed to meet its projected enrollments. The Court finds that the KCMSD did fail to meet its projected enrollments in 1986-87 and 1987-88, but that the difference between the actual and projected figures were relatively small. In 1986-87 the projected enrollment was 3,482 and the actual enrollment was 3,360, a difference of only 120 students. For 1987-88, projected enrollment was 3,300 and the actual enrollment was 3,060, a difference of 240 students. Most importantly, the evidence presented at the hearing showed that the students enrolled in the full day kindergarten for 1985-86 and 1986-87 scored at or above national norms on the Iowa Test of Basic Skills and that these same students continued to score at or above the national norms when they were tested at the end of the first grade. The full day kindergarten has also had a desegregative effect because the percentage of nonminority students participating in the program has been above the district wide average. This evidence of student achievemnt and desegregation warrants the continuation of this program.

For 1988-89, the KCMSD projects that it will need a total of 171 kindergarten teachers, 15 of which are proposed to be funded under the 1986-87 magnet component and five under the base budgets component. Therefore, the KCMSD requests funding of 51 teachers under the full day kindergarten component of the desegregation budget based upon a projected enrollment of 3,160. The KCMSD also requests continuation of the three resource teachers, a clerical position to assist in the preparation of new materials and to staff the lending library, and workshop stipends and related expenses for all kindergarten teachers. KCMSD also requests fund for additional supplies in 1988-89, 1989-90 and 1990-91.

The State claims that the 51 teachers requested to be funded under the desegregation budget are excessive because the number of teachers should be determined based upon an average rather than a maximum pupil teacher ratio, and because KCMSD's enrollment projections are excessive. The Court has ordered that no kindergarten class in the KCMSD shall consist of more than 22 students and therefore again rejects the State's argument. Regarding the State's claim of excessive enrollment projection, the Court simply cannot determine if KCMSD's projection is accurate. For 1988-89, the Court approves the funding requested for teachers, staff and supplies based upon KCMSD's projection but will not approve any increases for services in 1989-90 and 1990-91 at this time. Furthermore, for 1988-89, the KCMSD is ordered to only hire the number of teachers necessary based upon the actual enrollment and to only purchase supplies based upon that enrollment. The State also claims that during 1987-88 the KCMSD hired more teachers than was necessary to serve the actual enrollment at the Court ordered levels. The Court finds that the State has not presented any evidence supporting this claim and will not issue any credit as requested. The State also claims that in 1987-88 that the KCMSD paid only 89 rather than 100 kindergarten teachers out of its operating budget, and that it improperly charged the costs of these 11 teachers to the desegregation budget. Again, based upon the evidence presented at the hearing, and the post hearing briefs submitted by the parties, the Court finds no evidence to support the State's claim. However, the Court directs the KCMSD to submit documentation to the Desegregation Monitoring Committee setting forth the total number of kindergarten teachers actually employed by the KCMSD for 1987-88 and the number of teachers funded by the operating budget and desegregation budget.

For the reasons stated, the Court approves a fiscal year budget of $1,773,185 for 1988-89, 1989-90, and 1990-91. If student enrollments justify increased or decreased funding for 1989-90 and 1990-91, the Court will make an appropriate modification.

Extended Day

The KCMSD has proposed to reform its before and after school program into an extended day program similar to those presently offered at many of the magnet elementary schools. The projected budgets of $1,520,065 for 1988-89, $2,213,083 for 1989-90, and $3,228,519 for 1990-91, represent large increases over the 1987-88 budget of $233,759. The new proposals include expansion of the number of participating schools from the ten to thirteen in 1988-89, to eighteen in 1989-90, and to twenty-five in 1990-91. The proposal also increases transportation from two afternoons per week to five mornings and five afternoons per week. In addition, tutoring would be offered five afternoons per week instead of the current two and the enrichment activities would be greatly expanded. Finally, the program calls for a half-time coordinator at the central office to coordinate the program and a part-time coordinator at each individual school to coordinate the implementation of the activities at that particular school.

The State is opposed to continuing the program because it claims that it has not achieved its desegregation and student achievement goals. In the alternative, the State asserts that even if the program is continued for 1989-90, a five-fold increase in the budget is not justified. For school year 1985-86, the Court approved $104,400 for a before and after school program at ten schools. The KCMSD did not implement the plan as ordered and the Court did not approve any increase in the budget for 1986-87. The program did not meet its projected enrollments for 1986-87 and in 1987-88 the Court approved an increased budget of $ 233,759 to provide transportation two afternoons a week and the addition of certified teachers to improve the quality of tutoring. The Court found that the lack of transportation was the primary reason why many students did not participate in the program and gave the KCMSD another year to meet its projected enrollments. The enrollments rose from 398 in 1986-87 to 462 in the super-

visory component and 527 in the tutorial component in 1987-88. The Court also notes that the nonminority enrollment in the program also increased from 123 in 1986-87 to 156 in the supervisory component and 142 in the tutorial component in 1987-88. Notwithstanding these enrollment increases, the KCMSD's February 19, 1988 Longitudinal Evaluation concluded that the Before and After School Program "may be attracting desegregated enrollments in about half the sites" and that the ITBS scores in 1985-86 and 1986-87 "revealed no consistently significant differences within grade levels between students who were in the program and random samples of nonparticipating students from the same schools." ITBS scores for 1987-88 were not available. The KCMSD acknowledges that the program has fallen short of its desegregation and instructional goals and proposes an extensive expansion for 1988-89, 1989-90 and 1990-91.

Due to the limited success of the program, the Court finds that KCMSD's proposed budget increase for 1989-90 of $1,286,306 is not justified. The Court finds that the increasing enrollments is a positive sign and believes that the program should continue. The Court will not approve the expansion of the program from ten to thirteen schools in 1988-89 but approves an increase in tutoring from two to four days per week and also approves an increase in transportation from two to five afternoons per week. The Court will not approve the half-time coordinator at the central office but will approve a part-time coordinator at each particular school to implement the programs at those schools. The Court finds that a budget of $600,000 is reasonable for this program and represents a substantial increase over the preceding year. To the extent that the approved budget permits, additional enrichment activities are approved. The Court will not at this time approve any budget for years 1989-90 and 1990-91. The Court will consider budgets for these programs only after an evaluation of the success of the ITBS scores for 1987-88 and the 1988-89 program as approved by the Court.

Early Childhood Education

The KCMSD requests funding of $4,089,024 for the early childhood education program in 1988-89, an increase of approximately $900,000 over the 1987-88 budget. KCMSD also requests funding of $4,072,395 for 1989-90 and $4,315,207 for 1990-91. The State argues that the proposed program and budget should not be approved because contrary to prior orders of the Court, the KCMSD failed to seek input from the State in developing the program. In *Jenkins* v. *State of Missouri*, 639 F.Supp. 19, 32 (W.D. Mo. 1985), this Court did direct the State of Missouri and the KCMSD to cooperate in implementing the basic components of the early childhood development programs. Despite the State's claim, the Court will consider the proposed plan for 1988-89 because of the approaching school year. However, the Court will not approve the proposed program and budgets for 1989-90 and 1990-91, thereby giving the parties the opportunity to jointly develop an early childhood education program for those years.

The early childhood program consists of three components, the early learning centers for three and four year old children, a screening component for one through four year-olds, and a parent education program. The early learning centers have been very successful in 1987-88, serving a total of 640 students at 16 locations. For 1988-89, the KCMSD proposes to expand the number of early learning center locations to 25 which would allow it to serve a total of 1,000, including approximately 470 students presently on a waiting list. A substantial portion of the approximate $900,000 increase over last year's budget consists of the additional equipment needed for the nine new learning centers and the additional transportation needed for the increased enrollment. The Court finds that these expenditures are necessary and their cost reasonable.

The parent education program consists of parents as teachers program for families with children from birth to three years of

age and a district wide parent education program for parents of children three to four years of age. The parents as teachers program provides screening for children ages one and two, private visits and group meetings with parents to provide information about normal child growth and educational development suggestions, and a lending library with books and toys to be used by parents in the program. This program has been very successful and the Court will approve its continuation at the proposed budget.

To the contrary, the district wide parent education program has not been successful. In the fall of 1987, only 45 parents participated in the district wide parent education meetings, a decrease in attendance from both the fall and spring of the 1986-87 school year. Despite testimony that 94% of the parents who did participate in the program found that their knowledge of childhood development had increased because of the program, the Court cannot approve the continuation of the program for 1988-89 because of the lack of participation. The itemized early childhood program budget for years 1988-89, 1989-90, and 1990-91 was admitted at the hearing as State's Exhibit No. 1. However, the Court is unable to ascertain the exact amount budgeted for the district wide education program for 1988-89. The Court directs the KCMSD to submit this information to the Court.

Screening of children ages one through four is the third component of the early childhood development program. The State argues that the budget is excessive and should not be approved because it estimates that KCMSD's costs of screening three and four year olds in 1988-89 will be $222 per child while its cost to screen one and two year olds will only be $15 per child. The KCMSD claims that its screening costs for three and four year olds for 1988-89 is $81.00 per child. Based upon the testimony at the hearing, the Court finds that even $81 per student is excessive and orders that the KCMSD cost of screening 3 and 4 year olds shall not exceed $50 per child. The KCMSD

is further directed to reduce the budget accordingly and submit such information to the Court.

For these reasons, the Court approves a tentative early childhood budget for 1988-89 in the amount of $4,089,024, to be modified as found appropriate by the Court.

Base Budgets

In its order of July 6, 1987, the Court approved funding of $3,171,264 for the base personnel and resources of the two new magnets that opened in 1987-88, Lincoln South and the New Paseo Middle School. The Court found that these costs were desegregation expenses. For 1988-89, the KCMSD seeks $7,215,392 for continued funding of the base costs of those two schools plus the base costs of two elementary magnets that are scheduled to open in new facilities in 1988-89, the New Gladstone and the New West Elementary Schools. The State argues that these budgets are excessive because they duplicate costs found in the AAA budget, the long-range capital improvement plan, etc. The Court finds that the State's position is without merit. The overall AAA budget does not include funds for AAA materials for the base budgets, and the capital improvements expenditures contained in the base budgets are in addition to those ordered in the long-range capital improvement plan. The Court will not, however, approve the $40,094 proposed for facilities maintenance in the base budgets. The cost of maintaining these new facilities is to be financed by the KCMSD from its operating budget. The Court finds that the remaining costs included in the base budgets are reasonable and will approve funding for 1988-89 of $7,175,298 for these magnets as desegregation costs, but will reduce the approved amount by the costs avoided elsewhere in the KCMSD because most of the students attending these magnets are presently KCMSD students. The KCMSD has indicated that it is developing a formula that will calculate these avoided costs. The Court directs the KCMSD to submit the proposed formula and the amount of the costs avoided

for the school year 1987-88 to the Court by September 30, 1988, and for the school year 1988-89 as soon as they are available.

1986-87 Magnet Schools

The KCMSD has requested funding of $14,241,784 for the operation of original six magnet schools for 1988-89. This budget represents a 16% increase over the previous order. The KCMSD also requests funding of $14,966,072 for 1989-90, and $15,870,684 for 1990-91. The 1986-87 magnets have been successful in terms of actual desegregation and improving student achievement. Lincoln Academy has dropped from 79.1% minority in 1985-86 to 64% minority in 1987-88. It has also experienced great gains in achievement on the Iowa Test of Basic Skills examination, gaining two grades in reading and one and a half grades in math in the first year the school was a magnet. Its students also have a pass rate of 97.1% on the BEST test and have won numerous awards and recognitions, including some in competitions with suburban districts. In 1987-88, Swinney-Volker, and the Southwest Cluster magnet schools were all within several percentage points of the 60/40 minority/non-minority admissions guidelines set by the Court. The children at Swinney-Volker and the Southwest Cluster have also achieved significant academic gains as they are at or above national norms and have won awards in state and regional competitions. In 1988-89, these six magnet schools will collectively experience a 15% enrollment increase over 1987-88. The Court finds that this increase justifies a 16% increase in the budget. The Court also finds that these magnet schools were treated as separate student populations for purposes of maintaining AAA levels, and therefore that the AAA funds included in the proposed budget are not duplicated in the general AAA budget. For these reasons, the Court finds that the proposed budget of $14,241,784 for 1988-89 is reasonable.

The State argues that only the incremental cost of operating these schools as magnets should be approved as desegregation

costs. This would be consistent with the Court-approved long-range magnet school budget. In *Jenkins* v. *Missouri*, 639 F.Supp. 19, 53 (W.D. Mo. 1986), the Court found that "magnet schools can be utilized to assist in expanding the desegregative educational experience for KCMSD students," and ordered the implementation of a fully magnetized program at Lincoln Academy, the Southwest Cluster, and Swinney-Volker. The Court approved the full cost of the schools in 1986-87 as a desegregation expense. The 1986-87 magnets have proven successful and in November of 1986, the Court approved a long-range magnet school plan and budget which included only the cost of implementing the magnet programs at the schools contained within the plan, it did not fund the traditional programs at those schools. Now that the long-range magnet school plan is underway, the Court finds that separate funding treatment of the original 1986-87 magnet and those magnets contained within the long-range magnet plan is inappropriate. However, the Court is unable based upon the evidence before it, to determine these incremental magnet costs, and directs the KCMSD to determine the portion of the 1988-89 proposed budget that consists of operating costs which would have been incurred even without the Court ordered magnet programs. Because this information is not available to the Court at this time, the Court will approve the proposed budget of $14,241,784 for 1988-89 as a desegregation expense, but will allow the State a credit in the amount of these incremental costs as approved by the Court against the amount of their total desegregation obligation for year 1988-89. The Court will not approve the proposed budgets for 1989-90 and 1990-91 because these figures are also to be revised to reflect only the magnet costs of these schools for those years.

The KCMSD also requests funding of $506,730 for the transportation costs of the summer magnet programs at Lincoln College Prep, Swinney-Volker, the Southwest Cluster, Franklin, Pinkerton, and Knotts Schools for the summer of 1987. The Court finds that these are properly desegregation costs but the

Court is unable to determine if the amount requested is reasonable. The extended year program was described at the hearing but there was no testimony concerning the number of students transported. Therefore, the Court will not approve the requested amount without additional information.

AAA

The KCMSD has requested funding of $6,286,463 to maintain its AAA rating in 1988-89, a decrease of $54,151 from 1987-88. The KCMSD also seeks funding of $6,483,956 for 1989-90 and $6,842,545 for 1990-91. These requested budgets consist of salaries for teachers, counselors, librarians and library resources to maintain the AAA rating.

The KCMSD request includes $1,962,153 for library resources in 1988-89. This amount consists of $143,302 for a library resource and distribution center, $285,076 for an audio/visual department, and $1,533,755 for a circulation department, of which $1,376,293 is apparently for library resources needed at the individual schools to maintain the AAA rating. The Court finds that these expenditures are necessary and their cost reasonable, except for the $1,376,293 in resources contained in the circulation department budget. Dr. Casner, KCMSD Director of Curriculum testified that he used a per pupil average cost of $32.24 to calculate the expenditures required to maintain its AAA library resource status, which results in a total cost of approximately $1,140,000 for 1988-89. Therefore, the Court approves $1,140,000 rather than the proposed 1,376,293 for 1988-89. The Court makes similar reductions for 1989-90 and 1990-91.

The State argues that even $1,140,000 for library resource requirements is excessive because KCMSD failed to consider those resources purchased with effective schools funds and the resources contained in the full day kindergarten lending library. The Court disagrees. Effective funds were intended to be spent

at each school at the discretion of the school's principal and teacher-parent committees to address specific needs at that school. Including library resources purchased with these funds for AAA purposes might encourage school officials to purchase other items which may not be as needed as additional library resources to address a specific educational deficiency. The Court also finds that the lending library resources contained in the full day kindergarten program are not to be considered for AAA purposes because these resources consist of teaching aids and kits for teachers in assisting them in instruction, and are not resources which directly benefit the students.

In addition, the KCMSD requests $141,872 for base materials and equipment costs for 1988-89. After reviewing the evidence presented at the hearing, the Court is unable to determine the specific items for which these funds are requested and therefore, will not approve these funds at this time. For these reasons, the Court will approve as a desegregation expense $1,725,860 for AAA resources and maintenance in 1988-89, $1,842,048 in 1989-90, and $1,963,535 for 1990-91. The Court will not, however, order the State of Missouri defendants to fund any of these costs.

In *Jenkins* v. *Missouri*, 639 F.Supp. 19, 47 (W.D. Mo. 1986), the Court ordered that KCMSD's obligation for library resources in 1986-87 of $2,040,936 was "slightly higher than the amount needed to maintain AAA library resources on an ongoing basis" and that it "shall be used annually to insure maintenance of AAA standard library resources in the remaining years of this desegregation plan." With the assistance of the State, the KCMSD attained AAA status for library resources in 1986-87 under the desegregation plan and maintained this rating in 1987-88. Consistent with the Court's June 16, 1986 order, it is time that the KCMSD solely fund the cost of maintaining its library resources at the AAA level.

The KCMSD also moves the Court to approve $4,182,438 for librarians, counselors, physical education teachers, art teachers, music teachers, and substitute teachers needed to maintain the AAA status for 1988-89, $4,391,560 for 1989-90, and $4,611,138 for 1990-91. The State argues that the proposed budget is excessive because it includes seven additional elementary librarians, bringing the total number of librarians under the desegregation budget to 21. The State argues that these seven additional librarians exceed AAA requirements. The KCMSD claims that the seven librarians will replace 31 planning time aides that were funded in previous orders to provide regular teachers with the amount of planning time required by AAA. This substitution will not only provide the regular teachers with the required planning time and reduce the staff cost, but will permit the KCMSD to provide a librarian for at least one full day each week to all the elementary schools in the district. While this is not an AAA requirement, it is an added benefit which results from meeting the planning time requirement. The Court approves this request.

The Court also finds that the number of counselors, physical education teachers, art teachers, music teachers, and substitute teachers requested by the KCMSD are required to maintain the AAA rating and approves the proposed budgets. The Court finds that these budgets do not duplicate teachers, counselors and librarians that are included in the 1986-87 magnets budget and base budget. Therefore, the Court approves the proposed budgets for the costs of teachers, counselors and librarians needed to maintain the AAA level for 1988-89, 1989-90, and 1990-91.

For these reasons, the Court approves an AAA budget of $5,908,298 in 1988-89, $1,725,800 for which the KCMSD is solely responsible. For 1989-90, the Court approves an AAA budget of $6,233,608, with the KCMSD solely responsible for $1,842,048. For 1990-91, the Court approves a budget of $6,754,673, with KCMSD solely responsible for $1,963,535.

Salary Schedule

For fiscal year 1987-88, the KCMSD had projected an operating budget of $121,342,353 and total revenues of $110,558,418, creating a deficit of $10,783,835. Included in the operating budget was approximately $7,147 Million for additional teachers required for the seven period day that was to be implemented in the senior high schools beginning 1987-88, and for salary increases for both operating and desegregation teachers. In its order of September 15, 1987, the Court provided the KCMSD with $7.147 Million per fiscal year through 1991-92 to fund the teacher salary increases and the additional teachers necessary for the seven day period. For 1987-88, the KCMSD granted salary increases to its desegregation and nondesegregation teachers out of these funds. In the proposed desegregation budgets for 1988-89, 1989-90, and 1990-91, the KCMSD includes a 5% per year inflation increase for all personnel contained in the budgets, the same amount contained in the long-range magnet school budget. As a result, the salary increase that the KCMSD granted its desegregation teachers out of the $7.147 Million would no longer come from those funds, but rather would be funded by the desegregation budget. The Court finds that the current salaries of these desegregation teachers and any subsequent increases are properly desegregation expenses and will approve the 5% per year inflation increase contained in all the sub-budgets. However, the net result of this modification is that approximately $2,000,000 per year of the $7.147 Million generated by the Court to fund and maintain the 1987-88 salary increases is uncommitted for fiscal year 1988-89 through fiscal year 1991-92. KCMSD requests that it be allowed to utilize this fund to grant additional salary increases for its teachers who are funded by the operating budget. This request will be denied. This Court provided the $7.147 Million, part of which was to fund a salary increase for nondesegregation teachers, because the Court realized that the KCMSD needed additional money to attract and retain high quality teachers. However, any further salary increase for the

nondesegregation teachers within the KCMSD will not come from desegregation funds but must be granted from KCMSD's operating budget. Furthermore, the Court orders that the uncommitted $2,000,000 be placed in a reserve because it will be needed to fund additional desegregation costs for site selection, interest payments, magnet transportation, etc., costs that will apparently exceed those originally estimated by the Court.

PLAINTIFFS' MOTION TO MODIFY DESEGREGATION ORDERS

Environmental Science Program

The KCMSD started its environmental science program at North Rock Creek and Korte Elementary Schools in the fall of 1986, a year prior to the implementation date set forth in the long-range magnet plan approved by the Court. As a result, the KCMSD students who attended these elementary programs and who will be entering the sixth grade in the fall of 1988 are without an environmental science middle school program since Nowlin Middle School is not scheduled to open until the fall of 1989. To remedy this problem, the KCMSD requests the Court for a one time expenditure of $70,000 to provide a sixth grade environmental science magnet program at Nowlin School in 1988-89. The $70,000 includes $36,000 for a resource teacher to supervise the environmental science library, plan and implement field trips, and to maintain and dispense equipment. The balance consists of $9,000 for field trips, $5,000 for staff development and $20,000 for equipment. The Court finds that this program is necessary to provide continuity to this magnet program. Failure to do so may result in parents removing their children from the magnet schools and possibly the KCMSD, and cause adverse publicity for the magnet program at a time when parental confidence in the magnet schools is crucial to its success. Therefore, the Court will approve funding of $70,000 for a middle school environmental science program at Nowlin School for 1988-89. However, the Court finds that certainly some of the

equipment purchased with the $20,000 will not be expended during the school year 1988-89 and that the equipment needs for the environmental science program at Nowlin School for 1989-90 shall be reduced accordingly.

Central High School

Central High School is schedule to open its computer magnet program in 1989 and its classical greek magnet program in 1991-92. The computer component will consist of approximately 1,000 computers and the plaintiffs move the Court to approve funding for a system coordinator to oversee the computer system and a computer technician who will maintain the computers and supervise a student repair shop. The cost of these positions will be $87,000 per year. A computer consultant from Price Waterhouse Corporation testified that these positions are necessary for the computer magnet program to operate and to be cost effective. The Court agrees and finds that the positions of systems coordinator and computer maintenance manager will pay for themselves in a relatively short time due to increased efficiency, less down time, and lower repair costs. Accordingly, the Court will approve these positions at a total cost of $87,000, including fringe benefits for 1988-89, with a 5% inflation increase per year through 1991-92.

Physical Education Specialist at Northeast Law and Public Service Magnet

The fire and public safety component of the law and public service magnet program at Northeast High School is partially designed to prepare students to take and pass tests for fire, police, ambulance and other similar positions, tests which include physical conditioning requirements. The plaintiffs request funding of $30,500 per year, including fringe benefits, for an additional physical education teacher to address these specific physical conditioning requirements. The Court finds that this additional physical instruction can be incorporated in the regular

physical education classes presently provided at Northeast and thus the Court denies the plaintiffs' request for an additional teacher.

Additional Technician in the Magnet Personnel Office

The plaintiffs request funding of $28,000 per year for an additional technician to process the applications for staff stipend allotments, to recruit applicants for the teacher tuition assistance plan, and to obtain visas for the foreign teachers who accept employment in the KCMSD as a result of the magnet school plan. The manager of employment services for the magnet schools stated that these tasks, in addition to her other duties, required her to work an average of 14 hours per day. The Court finds that an additional technician is necessary and the Court approves the position of a personnel technician at a total cost of $26,079 for 1988-89, including fringe benefits, with a 5% inflation increase per year through 1991-92 for a salary adjustment should the KCMSD chose to grant such increases.

College Stipend Fund

The long-range magnet school plan provides for a college stipend program by which KCMSD would pay all or part of the tuition expenses of full-time undergraduate or graduate students in return for a promise by the students to teach in KCMSD schools for two or three years upon graduation. The budget for this program is $200,000 for 1986-87, $400,000 for 1987-88 and 1988-89, $300,000 for 1989-90 and $200,000 for 1990-91 and 1991-92. Due to the timing of the long-range magnet school order, the KCMSD claims that none of the $200,000 allocated for 1986-87 was expended. KCMSD also states that it will expend no more than $25,000 of the budget for the school year 1987-88. As a result, the plaintiffs propose that these unexpended funds be carried forward and that the budget in the long-range plan be modified to $0 in 1986-87, $25,000 in 1987-88, $500,000 in 1988-89, $400,000 in 1989-90, $400,000 in 1990-91, and

$375,000 in 1991-92, for a total budget of $1,700,000. This modification results in no net increase in cost to the parties for implementation of this component of the desegregation order. The State and the KCMSD are in favor of this modification and therefore the Court approves the modification as proposed.

For the reasons set forth in its order of July 6, 1987 at pp. 13-15, the Court orders that the State and the KCMSD are jointly and severally liable for the entire budget for 1988-89, except those costs that the Court specified are to be borne solely by the KCMSD, with the contribution between the two constitutional violators to be 75% by the State and 25% by the KCMSD.

Following are summaries of the 1988-91 desegregation budgets approved by the Court.

1988-89 Desegregation Budget

	Total	KCMSD'S Contribution	State's Contribution
District Communications	30,350.00	7,587.50	22,762.50
Research and Evaluation	89,980.00	22,495.00	67,485.00
Staff Development /Human Relations	-0-	-0-	-0-
Administrative Reorganization	-0-	-0-	-0-
Interest Payments (Includes $604,638 from 1987-88)	1,488,668.00	1,488,668.00	-0-
Desegregation Monitoring Committee	266,854.00	66,713.50	200,140.50
Effective Schools	6,680,000.00	1,670,000.00	5,010,000.00
Reduction in Class Size	8,787,191.00	2,196,797.70	6,590,393.30
Summer School 1988 (State's Contribution reflects credit for summer school 1987)	1,249,571.00	312,392.75	596,865.25
Full Day Kindergarten	1,773,185.00	443,296.25	1,329,888.75
Extended Day	600,000.00	150,000.00	450,000.00
Early Childhood Education	*4,089,024.00	1,022,256.00	3,066,768.00
Base Budgets	*7,175,298.00	1,793,824.50	5,381,473.50
1986-87 Magnets	*14,241,784.00	3,560,446.00	10,681,338.00
AAA	5,908,298.00	2,771,424.50	3,136,873.50
Environmental Science Magnet Program	70,000.00	17,500.00	52,500.00
Magnet Personnel Techinician	26,079.00	6,519.75	19,559.25
Central High School Staff Positions	87,000.00	21,750.00	65,250.00
	*52,563,282.00	15,551,670.00	36,671,295.00
Credit for 1987-88 interest payment by State			-264,796.00
			36,406,499.00

* to be reduced as set forth in the Court's Order.

No allocation is made between the KCMSD and the State for the years 1989-90 and 1990-91 because of the numerous open items.

	1989-90	1990-91
District Communications	30,725.00	31,125.00
Research and Evaluation	5,060.00	5,414.00
Staff Development/ Human Relations	-0-	-0-
Administrative Reorganization	-0-	-0-
Interest Payments	833,380.00	788,067.50
Desegregation Monitoring Committee	open	open
Effective Schools	7,300,000.00	7,500,000.00
Reduction in Class Size	8,787,191.00	8,787,191.00
Full Day Kindergarten	1,773,185.00	1,773,185.00
Extended Day	open	open
Early Childhood	open	open
Base Budgets	open	open
1986-87 Magnet Schools	open	open
AAA	6,233,608.00	6,574,673.00
Central High School Computer Staff Positions	91,350.00	95,915.50
Personnel Technician in the Magnet Personnel Office	27,383.00	28,753.00
*Summer School 1989	1,793,397.00	
*Summer School 1990	1,886,663.00	
*Summer School 1991	1,992,795.00	

*to be reduced as set forth in the Court's order.

The Desegregation Monitoring Committee has informed the Court of internal disagreements among certain KCMSD board members concerning the awarding of jobs and construction contracts necessitated by the remedial plan to minorities. The sole purpose of the Court's desegregation plan is to eliminate the vestiges of the unlawful segregation caused by the State of Missouri and the KCMSD. Establishment of a quota regarding

the awarding of jobs and contracts to women or minorities is beyond the scope of the desegregation plan and will not be allowed to interfere with the effective implementation of the Court's remedial orders. The Desegregation Monitoring Committee is specifically charged with monitoring this aspect of the plan.

Accordingly, it is hereby

ORDERED that the Court approves the 1988-89, 1989-90 and 1990-91 desegregation budgets as set forth in this order; and it is further

ORDERED that the KCMSD is directed to submit to the Court modified budgets for year 1988-89 for the early childhood education program, the base budgets, and the 1986-87 magnets; and it is further

ORDERED that the KCMSD is to submit amended budgets for the 1989, 1990, and 1991 summer school programs.

/s/ Russell G. Clark
RUSSELL G. CLARK,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Dated: July 25, 1988

APPENDIX J

IN THE UNITED STATED DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: July 5, 1989]

On May 9 through May 12, 1989, the Court conducted a hearing regarding the KCMSD's motion for approval of a desegregation plan for 1989-90. Plaintiffs also moved for program and budget modifications of prior remedial orders. The KCMSD filed a motion to amend its previous motion for approval of a desegregation plan for 1989-90. The KCMSD's motion to amend will be granted. In addition, the parties filed post-hearing briefs in support of and in opposition to the KCMSD's and plaintiffs' motions. Based upon the evidence presented at the hearing and the filings with the Court, the Court will grant the KCMSD's motion for approval of a desegregation plan for 1989-90 and plaintiffs' motion for program and budget modifications of prior remedial orders as set forth in this order. The State filed a motion to strike plaintiffs' reply brief. Plaintiffs filed suggestions in opposition to the State's motion to strike. The State's motion to strike will be denied. The Court will make DMC appointments for two year terms beginning July 1, 1989, as set forth in this order.

KCMSD'S MOTION FOR APPROVAL OF A DESEGREGATION PLAN FOR 1989-90

AAA

In its order of July 25, 1988, this Court approved a 1989-90 AAA budget of $6,233,608 with the KCMSD solely responsible for $1,842,048 for AAA resources and maintenance. *Jenkins* v. *State of Missouri*, Order of July 25, 1988, at 21-24 (W.D. Mo. 1988). The KCMSD now proposes two modifications in the AAA component for 1988-89 resulting in a slightly reduced budget request of $6,231,123. First, the KCMSD requests that one of the AAA librarians originally approved at the high school level be allocated among the four special schools because such schools previously have not had the services of a librarian. The KCMSD states that based on high school enrollment projections for 1989-90, the KCMSD will need only 12 of the 13 Court-approved high school librarians in order to retain AAA status. A June 17, 1988, letter from the State informing the KCMSD that it had received an AAA rating for 1987-88 contained the following:

> ADVISEMENTS: The following advisements relate to standards which are not being fully met for the specific classification rating. These items should be corrected and fully met before the next school year opens unless a previous agreement for progressively planned improvement has been made with the Supervisor of Instruction:
>
> * * *
>
> V-3 The services of a qualified learning resource director or librarian should be provided at least one-fourth time in the high school. (Fairview Alternative)

KCMSD Exhibit 2 at 2. A May 19, 1989, letter from the State informing the KCMSD that it had received an AAA rating for 1988-89 contained the following advisement: "Support services

at all special and alternative schools should be provided." KCMSD's Reply to State and AFT 691's Post-Hearing Memoranda Regarding Year 5 Desegregation Budget Proposal, Exhibit A at 2. As a result, the Court will approve the allocation of one of the AAA high school librarians among the four special schools. The KCMSD's second proposed modification is a minor reduction in the AAA budget for library resources due to a refinement in the mathematical calculations. The Court will approve such reduction. Therefore, the Court will approve an AAA budget of $6,231,123 in 1989-90 with the KCMSD solely responsible for $1,842,048 for AAA resources and maintenance.

1986-87 Magnet Schools

In its order of July 25, 1988, the Court approved a 1988-89 budget of $14,241,784 for the 1986-87 magnets but stated that it would allow the State a credit for base costs necessary to operate a traditional program at each school. *Jenkins*, Order of July 25, 1988, at 19-21. The Court also refused to approve a proposed budget of $14,966,072 for 1989-90 "because these figures are also to be revised to reflect only the magnet costs of these schools for those years." *Id.* at 21. The KCMSD subsequently submitted a budget for 1988-89 delineating between base operating costs and incremental magnet costs. The Court refused to approve the budgets "without further justification that the items identified by the State in its response are properly allocated 100% to theme costs." *Jenkins*, Order of April 3, 1988, at 5. The KCMSD's budget request for the 1986-87 magnets for 1989-90 is $14,805,851, slightly lower than the previous request of $14,966,072 for 1989-90 due to an anticipated enrollment reduction at Hartman and Swinney and a refinement in the mathematical calculations for AAA library resources.

The State argues that the 1986-87 magnet budget components should not be addressed by the Court until the KCMSD has satisfied this Court's order of April 3, 1989. The KCMSD counters that the only issue is whether the 1989-90 budget is

reasonable and that the KCMSD will comply with the Court's April 3, 1989, order in a separate brief. This Court has previously found that the 1986-87 magnets have been successful in desegregating and improving student achievement. *Jenkins*, Order of July 25, 1988, at 19. Therefore, the Court finds that the proposed budget of $14,805,851 for 1988-89 is reasonable and will approve such budget as a desegregation expense, but will allow the State a credit in the amount of the base costs necessary to operate a traditional program at each school against the amount of their total desegregation obligation for 1989-90. The Court directs the KCMSD to submit budgets for the 1986-87 magnets for 1988-89 and 1989-90 delineating between base operating costs and incremental magnet costs with appropriate justification for items allocated 100% to theme costs as required by the Court's order of April 3, 1989, on or before August 31, 1989. Therefore, the Court will not approve the KCMSD's proposed 1990-91 budget of $15,706,549 at this time.

Effective Schools

The Court approved an effective schools budget of $7,300,000 for 1989-90 in its order of July 25, 1988. *Id.* at 7. The KCMSD now requests a $275,000 reduction in the previously approved budget resulting from changes in projections of minority enrollment and program modifications. The State does not challenge the KCMSD's proposal. Therefore, the KCMSD's proposed budget for 1989-90 for effective schools of $7,025,000 will be approved.

Base Budgets

The KCMSD proposes a base budget component of $9,594,079 for 1989-90. The State does not oppose this proposal. The Court will approve the base budget component of $9,594,079 as a desegregation expense. However, the State will be allowed a credit for the amount of costs avoided elsewhere as addressed by the Court in its order of May 24, 1989. The Court directs the

KCMSD to submit the amount of costs avoided elsewhere for 1988-89 to the Court on or before August 31, 1989 and for 1989-90 as soon as they are available.

Early Childhood Education

Pursuant to this Court's order of July 25, 1988, the KCMSD and the State have cooperatively developed the 1989-90 early childhood education program. *See id.* at 16-17. The result is a proposed 1989-90 budget of $3,607,545, which is $481,479 less than the 1988-89 budget approved by the Court. *See id.* at 18. The Court will approve the 1989-90 budget of $3,607,545.

Extended Day

The Court previously approved a $600,000 extended day budget for ten traditional schools for 1988-89, but refused to approve budgets for 1989-90 and 1990-91 stating that the Court would consider those budgets "only after an evaluation of the success of the ITBS scores for 1987-88 and the 1988-89 program as approved by the Court." *Id.* at 16. For 1989-90 the KCMSD proposes that the extended day program continue at six of the ten schools where it is currently operating and requests a budget of $405,000. The State argues that the KCMSD has failed to present evidence regarding the success of the program as required by this Court's order of July 25, 1988.

Testimony at the hearing overwhelmingly indicated that parents and teachers favor the extended day program and that the program teaches children social skills, enhances desegregation and increases academic performance. In 1988-89 39% of the students in before school programs, 37% of the students in after school supervision programs and 34% of the students in after school tutoring programs were nonminority students. KCMSD Exhibit 1 at § 4 p.3. These figures compare with 35%, 35% and 34%, respectively, for 1987-88. *Id.* The total number of students enrolled in the after school supervision and tutoring programs

has increased dramatically from 1987-88 to 1988-89, while enrollment in the before school program has remained almost constant. *Id.* Overall, total participation by nonminority students in the extended day program has increased from 33% in 1987-88 to 37% in 1988-89, while enrollment increased from 681 students in 1987-88 to 1,217 students in 1988-89. State's Exhibit 7 at 2. ITBS scores for 1985-86, 1986-87 and 1987-88 indicate a consistent trend of increased performance for students in the extended day program. KCMSD Exhibit 1 at § 4 p.5. Additionally, students participating in the 1987-88 extended day program consistently outperformed nonparticipants on the ITBS. *Id.* Achievement data for 1988-89 is not yet available because the achievement tests were not administered until April of 1989. (Tr. at 242). Thus, the KCMSD has presented evidence regarding the success of the program as required by this Court's order of July 25, 1988, and the Court finds that the evidence justifies the continuation of the extended day program at the six traditional schools.

The State argues that a $405,000 budget request represents a 12.5% increase in the average per school budget for the program. The KCMSD's request consists of $250,000 for salaries, $85,000 for transportation and $70,000 for materials and supplies. KCMSD Exhibit 1 at § 4 p. 4. Salary costs were derived based upon the 1988-89 extended day enrollment at the six schools remaining in the program and include funding for the part-time extended day facilitator at each school. *Id.* Transportation costs were determined based upon the number of buses each school used for afternoon transportation five days a week in 1988-89. *Id.* Costs for materials and supplies were based upon projected enrollments for 1989-90 and expenditures of the six schools for 1988-89. *Id.* The Court finds that the extended day budget request for $405,000 is reasonable and, therefore, will approve such request.

Full Day Kindergarten

The Court previously approved a full day kindergarten budget of $1,773,185 for 1989-90 stating that "[i]f student enrollments justify increased or decreased funding for 1989-90 . . . , the Court will make an appropriate modification." *Jenkins*, Order of July 25, 1988, at 14. The KCMSD has not requested a modification of the previously approved budget for 1989-90 and believes that, based on enrollment projections, the budget is sufficient. The State argues that the KCMSD has not demonstrated that the previously approved budget is necessary to serve the number of students currently projected for 1988-89. The Court does not find it necessary to modify the previously approved full day kindergarten budget of $1,773,185 for 1989-90.

Reduction in Class Size

The Court previously approved a reduction in class size budget of $8,787,191 for 1989-90 stating that "[i]f student enrollments justify additional funding for 1989-90 . . . , KCMSD may move the Court for such funding." *Id.* at 8. The KCMSD did not request a modification in the previously approved reduction in class size budget. The State argues that the budget is excessive based on projected enrollments and that the State has long since exceeded the $12,000,000 funding obligation cap previously set forth by the Court. *See Jenkins*, 639 F.Supp. 19, 30 (W.D. Mo. 1985).

In its order of July 25, 1988, the Court placed a funding obligation on the State for 75% of the $8,787,191 class size reduction budget for 1988-89, which caused the State to exceed the $12,000,000 funding cap previously set forth by the Court. *See Jenkins*, Order of July 25,1988, at 7-9. The Court listed three reasons for allowing the funding cap to be exceeded in 1988-89: (1) maximum class sizes were not attained in 1987-88; (2) at the time of the 1985 order, the KCMSD was not operating middle schools nor did its high schools have a seven period day; and (3)

maximum class sizes must be maintained once achieved and nothing in the 1985 order precluded the Court from ordering the State to fund a share of the maintenance. *Id.* at 8. Although no evidence was presented at the hearing regarding the reduction in class size budget, the State claims that maximum class sizes were attained in 1988-89, that maximum class sizes were reached in the context of full implementation of middle schools and the seven period days and, finally, that the Court has previously recognized that maintenance is a KCMSD obligation. State's Post Hearing Memorandum Regarding Year 5 Desegregation Budget Proposal at 11 n.9. The KCMSD did not refute the State's claims except to quote from the Court's July 25, 1988, order that the 1985 order does not preclude the Court from ordering the State to fund a share of the maintenance for class size reduction. KCMSD's Reply to State and AFT 691's Post-Hearing Memoranda Regarding Year 5 Desegregation Budget Proposal at 4.

The Court recognizes that the State's original funding cap of $12,000,000 has been exceeded. Nonetheless, the Court imposed the $12,000,000 funding cap and, therefore, the Court has the discretion to increase the cap or to require State funding to further exceed the cap. Although the Court has previously recognized that it is not precluded from ordering the State to fund a share of the maintenance for class size reduction, the Court has also previously recognized that the KCMSD should be responsible for maintenance under the plan. *See Jenkins*, Order of July 25,1988, at 19; *Jenkins*, 639 F.Supp. at 41. The Court previously stated: "While the funds allocated by this Court for the purpose of reducing class size will provide significant assistance, the financial responsibility for reaching beyond these minimal goals and reaching toward educational excellence must be borne by the patrons of the KCMSD." *Id.* at 30. The Court believes it is time for the KCMSD to begin to bear the responsibility for maintenance of class size reduction goals achieved under the plan. Therefore, the Court will gradually increase the KCMSD's

funding responsibility for the class size reduction budget. The KCMSD will be responsible for 50% of the 1989-90 budget of $8,787,191, 75% of the 1990-91 budget and 100% of the 1991-92 budget. The Court realizes that the KCMSD may not have adequate desegregation funds to satisfy this funding obligation in total. To insure that funds are available for class size reduction, the State will be required to make up any shortfall in the KCMSD's funding obligation pursuant to joint and several liability and the revised drawdown procedure previously approved by the Court. *See Jenkins*, Order of January 3, 1989, at 4-5. However, for purposes of indemnity, the funding obligation is placed 50% on the KCMSD for 1989-90.

District Communications

The Court has previously approved a district communications budget of $30,725 for 1989-90. *Jenkins*, Order of July 25, 1988, at 1. The KCMSD does not seek a modification of the previously approved budget for 1989-90 and the State does not oppose the budget.

Research and Evaluation

The Court previously approved at 1989-90 budget of $5,060 for research and evaluation. *Id.* at 2. The KCMSD seeks no modification of the previously approved budget. The State argues that 70% of the budget constitutes repair and maintenance of computer equipment and that such costs should be borne solely by the KCMSD. The State argues that the 1989-90 funding level should be $1,444. State's Post Hearing Memorandum Regarding Year 5 Desegregation Budget Proposal at 16. The Court will adopt the analysis set forth in its order of July 25, 1988: "The Court finds that these expenditures are necessary and their cost reasonable and approves them as part of the desegregation budget for [1989-90]. *Jenkins*, Order of July 25, 1988, at 2.

Summer School 1989

The Court previously approved a summer school 1989 budget of $1,435,097. *Jenkins*, Order of April 3, 1989, at 2. The KCMSD does not seek a modification of that budget and the State does not oppose the budget.

Debt Service

The KCMSD requests that the Court recognize as a desegregation expense the KCMSD's full cost of debt service of the $10,000,000 bond issue for the KCMSD's share of the initial $37,000,000 in Court-ordered capital improvements. The KCMSD argues that the principal payments, like the interest payments, are a part of the KCMSD's cost of obtaining its share of funding for Court-ordered capital improvements under the remedial plan and, therefore, are proper desegregation expenditures. The State opposes the KCMSD's request. The Court will deny the KCMSD's request. The KCMSD has previously been given credit against its capital improvement obligations for the $10,000,000 bond issue principal. *See Jenkins*, 639 F.Supp. at 40-41.

Latin Grammer Magnets

The KCMSD seeks funding to provide two new uniforms for each student in the elementary Latin Grammer magnets and to provide periodic replacement of worn out and outgrown uniforms. The KCMSD requests a uniform budget of $47,680 for 1989-90, $39,360 for 1990-91 and $39,360 for 1991-92. The State argues that "it is not enough that the State is funding the education of KCMSD students; it now demands that the State clothe the students as well." Response of State Defendants to KCMSD Motion for Approval of Desegregation Plan 1989-90 and to Motion of Plaintiffs for Program and Budget Modifications of Prior Remedial Orders at 3.

The Long Range Magnet Plan ("LRMP") provides that "students will be required to wear a school uniform" at Latin

Grammer elementary magnets and that "[u]niforms will be provided by the District." LRMP at 117. Article IX, § 1(a) of the Missouri Constitution requires public schools to furnish "gratuitous instruction." The State interprets this constitutional provision to prohibit school districts from charging a fee for any aspect of a public education that is required by a district, (Tr. at 829-30), such as uniforms. Additionally, Ms. Marie Grant, the principal at Pinkerton Latin Grammer elementary magnet, testified that she could see the difference in the behavior of the students due to the uniforms, stating that the students were "more structured, and more ladylike and manlylike in their uniforms." (Tr. at 138). She also testified that parents like the uniforms because there is no competition among students with regard to clothing. (Tr. at 143). The Court will approve a 1989-90 budget of $47,680 for uniforms at the Latin Grammer elementary magnets and 1990-91 and 1991-92 uniform budgets of $39,360.

The KCMSD also seeks accelerated and increased funding for computers at the Latin Grammer elementary magnets. The KCMSD requests a 1989-90 budget of $173,700. The KCMSD states that budget lines for computers in the LRMP provide for 25 computers at Pinkerton and 20 computers at Garfield, but that these numbers are insufficient to meet the LRMP requirement of 4 computers in each classroom at the schools. The KCMSD states that 35 more computers are needed at Pinkerton and 64 at Garfield. Also included within the budget request are funds for networking computers with a computer lab. The State counters that the LRMP took into account computers that were already in use at each school or that were to be provided through other funding sources and, therefore, the funding provided under the LRMP is appropriate.

The LRMP states that "[e]ach classroom will house four microcomputers for individualized and/or networked courses." LRMP at 118. Pinkerton has 15 classrooms. Thus, to satisfy the LRMP Pinkerton needs 60 computers. The LRMP budget

provides funds for 25 computers, leaving a need for 64 computers. The Long Range Capital Improvements Plan ("LRCIP") calls for a computer lab at the Latin Grammer elementary magnets. Additional computers purchased with other funds for use in the labs should not be counted against the LRMP computer requirements. *See Jenkins*, Order of July 25, 1988, at 22. Testimony at the hearing indicated that these computers should be made available as soon as possible for one-on-one and group instruction of students on basics. (Tr. at 153-54). The Court will approve the 1989-90 budget request of $173,700 for computers at Latin Grammer elementary magnets.

Visual and Performing Arts Magnets

The KCMSD requests funding for additional art and music teachers and two Suzuki violin teachers at the Visual and Performing Arts elementary magnets in the amount of $174,394 for 1989-90, $183,114 for 1990-91, and $192,769 for 1991-92. These magnets are to emphasize the arts areas of music, art, theater and dance. The LRMP budget funds two arts teacher positions at each magnet and the site task forces decided that since music and art were currently offered by the KCMSD, the two arts teacher positions should be designated as theater and dance. The KCMSD argues that the additional music and arts teacher positions are needed to make the arts and music component of the magnets different from what is offered in the rest of the KCMSD. The State counters that the LRMP does not envision four separate teachers at the elementary level to teach art, music, theater and dance, but instead contemplates arts teachers to cover the whole range of the curriculum.

The LRMP provides that elementary classes grades K-2 will participate "in daily arts projects presented by the primary level arts teacher. Projects are designed for student exploration in dance, theater, music, and art. The homeroom teacher and *art teacher* will integrate the skills, concepts, and understandings of the core subjects and the arts projects." LRMP at 89-90 (emphasis added). Elementary students in grades 3-5 will be allowed to schedule "aesthetic" time daily allowing freedom to explore dance, theater, music and art. *Id.* at 90. Thus, it appears that the State's interpretation of the LRMP is correct; the LRMP does not envision four separate teachers at the elementary level to teach the four areas of art,music, dance and theater, but instead contemplates arts teachers to cover the range of the curriculum. This interpretation is supported by the LRMP's requirement for middle schools that "[e]ach student's schedule reflects arts time daily, much the same as the intermediate unit, *but the instructor is always an arts specialist.*" *Id.* (emphasis added). The KCMSD argues that students at the Visual and Performing Arts elementary magnets currently only receive one hour of art and one hour of music instruction per week, which provides only the most basic program. However, testimony at the hearing indicated that elementary students only receive one hour of drama and one hour of dance instruction per week even with the two LRMP arts teacher positions designated as theater and dance. (Tr. at 531). This was in addition to playing a musical instrument two hours per week. (Tr. at 528, 529). Thus, the Court is not convinced that the additional art and music teachers are necessary under the LRMP and will not approve such teachers.

The KCMSD also requests funds for two Suzuki violin teaches for Suzuki classes required to be offered as an elective by the LRMP. The KCMSD argues that Suzuki instruction resulted in more student/parent interest in the program than could be accommodated, with a waiting list at all four elementary schools. The State counters that the KCMSD has not demonstrated a need for additional desegregation funding for Suzuki teachers and that Suzuki is simply an elective for students with no requirement that every student expressing an interest be given a chance to take it.

The LRMP provides that Suzuki violin be offered as an elective at the elementary magnets. LRMP at 90. During the

1988-89 academic year one Suzuki teacher visited each of the four magnets every day because the Suzuki method requires multiple weekly sessions with parents and students. Suzuki is attractive to parents, requires parent participation and induces a higher level of thinking that carries over into the classroom. (Tr. at 472-73, 524-25). There is a waiting list for Suzuki at all four Visual and Performing Arts elementary magnets and parents have less interest in enrolling students in the magnets when Suzuki classes are filled. (Tr. at 474-75). The Court will approve the funding of two Suzuki teachers under the LRMP, as Suzuki provides desegregative attractiveness to the elementary Visual and Performing Arts magnets. However, because the KCMSD combined its budget request for Suzuki teachers with the request for art and music teachers, the Court cannot ascertain the budget necessary for the Suzuki teachers. The KCMSD is directed to submit a budget request for the certified Suzuki teachers for 1989-90 on or before August 31, 1989.

Defensive Driving Program

The KCMSD requests funding of $55,883 for 1989-90, $2,830 for 1990-91 and $2,830 for 1991-92 for a defensive driving program in the Law, Public Service and Military magnet at Northeast High School. The KCMSD argues that the program is designed to support the magnet themes at Northeast High School and will provide career exploration in law enforcement and public service. The State argues that the program is misguided and bears no relationship to law and public service.

The KCMSD's proposal states that the purpose of the course is "to familiarize students with the proper procedures for operating and maintaining emergency vehicles and public safety vehicles used in the metropolitan area and to assist students in developing minimum skills necessary to obtain jobs within the law and public service field and the military." KCMSD Exhibit 1 at § 11 p. 12. However, testimony at the hearing indicated that defensive driving skills are not relevant to hiring decisions in the

law and public service areas. (Tr. at 713, 726-27, 752, 755-56, 772-74). Such skills are taught to new recruits in the law and public service areas even if the recruit has previously had such training. (Tr. at 714-15, 728, 774). Although the defensive driving program contains a vehicle maintenance component, law and public service agencies do not teach maintenance to recruits, but instead send the vehicles to a maintenance center for care. (Tr. at 717, 729-30). Witnesses agreed that they would be against the teaching of defensive driving to high school students. (Tr. at 718, 753-54). Additionally, safety of the students is a concern. (Tr. at 756). Based on the evidence introduced at the hearing, the Court cannot approve the defensive driving program.

Magnet Extended Day

The KCMSD requests budgets of $500,000 for 1989-90, 1990-91, and 1991-92 for extended day programs at Pinkerton, Knotts, Attucks, Garfield and Troost magnets. The State argues that the KCMSD has failed to present evidence regarding the success of the program as required by this Court's order of July 25, 1988. Additionally, the State argues that the KCMSD's request is inappropriate under the LRMP because it would place an extended day program at every elementary magnet school.

The Court addressed the State's argument regarding evidence on the success of the extended day program previously in this order and determined that the KCMSD had presented evidence as required by this Court's order of July 25, 1988. *See supra* pp. 5-6. However, the LRMP provides that *"[s]ome* elementary magnets will offer an extended day program." LRMP at 56 (emphasis added). The State argues that the KCMSD requested funding for extended day programs at all schools becoming magnets in 1989-90 as well as at each of the elementary schools proposed for new themes, and that when this request is combined with extended day funding already provided under the LRMP, there will be an extended day program at every elementary

magnet school in contravention of the LRMP. The KCMSD previously requested funding for extended day programs at Knotts and Pinkerton. The Court responded:

> First, the long-range magnet plan proposed by the KCMSD and approved by this Court does not provide an extended day program at Knotts and Pinkerton Elementary Schools. The Court finds, as the drafters of the long-range magnet plan certainly believe, that it is the specific magnet programs at these schools that must attract the non-minority students. Furthermore, due to the limited success of the extended day program, the Court cannot rely on it to desegregate the KCMSD and therefore will deny the KCMSD's request for additional funding for extended day programs at Knotts and Pinkerton at this time.

Jenkins, Order of August 29, 1988, at 3. Once again, the Court adopts this analysis and will not approve the KCMSD's request for extended day programs at Pinkerton, Knotts, Attucks, Garfield and Troost magnets at this time.

AVATS

The KCMSD requests that the Court approve deferring the opening of the magnet program at the Advanced Vocational and Techinical High School ("AVATS") from 1989-90 to 1990-91. The KCMSD states that the AVATS building needs to be vacated for 1989-90 to permit additions and renovations and that the program cannot begin in an annex due to the difficulty and cost involved in purchasing equipment, installing it in the annex and then returning it to its permanent location. The KCMSD also requests the following budget realignment resulting in no cost increase for the program: $3,164,068 for 1989-90, $3,079,907 for 1990-91, and $2,673,070 for 1991-92. The State argues that the KCMSD proposed the AVATS renovations nearly three years ago but failed to explain why the capital improvements are

not yet underway, that the AVATS site task force has been in place for nearly two years but a curriculum has not been developed and that no principal has been hired.

Mr. Willy Giles, assistant superintendent supervising the planning of the AVATS magnet program, testified that there was no way the AVATS facility would be ready for students by September of 1989. (Tr. at 66). Thus, the Court has no choice but to grant the KCMSD's request for deferral of the opening of the AVATS magnet school, as denial of the request would cause the magnet program and the students to suffer. However, the tragic result of the situation is that the children who are students in the KCMSD suffer the most as a result of the KCMSD's poor planning process. The Court warns that those persons responsible for the AVATS planning process may be held in contempt of Court if the planning process for the AVATS is not improved and the AVATS magnet program is not implemented as planned in 1990-91. Additionally, the Court warns that if proper planning does not occur, desegregation funds will not be approved for the AVATS. With this in mind, the Court will approve the deferral of the opening of the AVATS and the realigned budget as proposed by the KCMSD.

Music Accompanists

The KCMSD seeks funding for three music accompanists at the Kansas City School of the Arts and proposes a budget of $37,875 for 1989-90, $39,769 for 1990-91 and $41,758 for 1991-92. The KCMSD argues that these positions support the theme by permitting teachers to focus exclusively on instruction during classes and rehearsals, by supporting the choral, instrumental and dance programs during the regular school day and by providing group and individual instruction during and after school. The State did not challenge the KCMSD's proposal. The Court will approve the budget for music accompanists as proposed by the KCMSD.

Unthemed Magnets

In phases VI and VII of the LRCIP there are three elementary schools and two middle schools for which no themes have been provided. The KCMSD proposes that the elementary schools be themed as Latin Grammer ("Elementary I"), Reading and Language Arts Academy ("Elementary II"), and Environmental Science ("Elementary III"), and that the middle schools be themed as an Arts and Science Academy ("Middle I") and Classical Greek ("Middle II"), with the Classical Greek theme being shifted from Northeast Middle School to Middle I. The KCMSD proposes that Northeast Middle be themed as Global Studies. Finally, the KCMSD requests that the Gifted and Talented theme of Southeast Elementary III be deferred to a later phase to permit the KCMSD to review the overall gifted and talented program, with Southeast III being themed a Montessori magnet. To provide these themes, the KCMSD requests a 1989-90 budget of $1,886,040, a 1990-91 budget of $3,050,947 and a 1991-92 budget of $3,022,064.

The State argues that Elementary I, II and III were proposed by the KCMSD and ordered by the Court under the LRCIP as traditional schools, not magnet schools. The State argues that a three page chart setting forth proposed funding allocations the KCMSD submitted to the Court in conjunction with its Motion for Approval of the Long Range Capital Improvements Plan indicates that Elementary I, II and III were ordered as traditional schools. *See* States Post Hearing Memorandum Regarding Year 5 Desegregation Budget Proposal at Attachment 5. The State argues that the chart indicates that the three schools were not designated as magnets and that the proposed 75/25 allocation for the schools on the chart is consistent with the allocation proposed by the KCMSD for nonmagnet work. *Id.* at 18 n.18. The State concludes that maintaining these schools as traditional schools is consistent with the LRMP directive that half of the KCMSD's elementary schools remain as traditional schools. The KCMSD

did not refute the State's argument, but instead stated that "[t]he more serious flaw with the State's argument is that it fails to explain how these schools will draw desegregated enrollments as traditional schools." KCMSD's Reply to State and AFT 691's Post-Hearing memoranda Regarding Year 5 Desegregation Budget Proposal at 11.

The LRMP provides that while every senior high and middle school will become a magnet school, "[a]pproximately half of the elementary schools either will become complete magnets or will have a magnet them." LRMP at 1. The Court is not convinced that Elementary I, II and III were ordered as magnet schools and, therefore, will not approve the KCMSD's request to provide magnet themes for these schools at this time. However, the Court will request that the parties file further briefs on the issue of whether Elementary I, II and III were ordered as magnet schools under the LRMP or the LRCIP on or before August 31, 1989.

The State opposes the KCMSD proposal for an Arts and Sciences magnet theme at Middle I arguing that the desegregative attractiveness of the theme has not been established and that the theme describes an ordinary middle school. Dr. Ronald Simpson, director of school management for the KCMSD, testified that the theme is designed "to create an exceptionally good liberal arts middle school that has a humanities orientation that tends to take the middle school child and teach that student the things that we think they need to teach the way they learn, not particularly the way it is convenient for us to teach." (Tr. at 347). A member of the SAC for Middle I testified that elementary students in the Applied Learning Center magnets had no middle schools in which to enroll that were multi-disciplinary with broad liberal arts concepts. (Tr. at 430-31). Middle I is designed to be a feeder school into the Visual and Performing Arts High School, the engineering program at Van Horn High School, and the Southwest Math and Science High School. (Tr. at 350). Although Dr.

Terry Stewart testified that the Arts and Science Academy was a "common, ordinary, good, sound, basic middle school" with a new approach to the government of the school, (Tr. at 792,793), the Court finds that the Arts and Science Academy is an appropriate magnet theme. The theme uses a unique teacher center concept and will provide students an in depth arts and sciences curriculum. *See* KCMSD Exhibit 1 at § 11 pp. 32-33. The Court will approve the Middle I Arts and Sciences theme and will also approve the proposed budgets of $537,184 for 1989-90, $890,690 for 1990-91 and $852,350 for 1991-92.

The State argues that Court approval of moving the middle school Classical Greek theme from Northeast Middle School to Middle II at the Jewish Community Center should be withheld pending KCMSD's elaboration on the necessary additions, renovations and costs. Although the Jewish Community Center would require adaptations and addition of classrooms, it would be much more cost effective to implement the Classical Greek theme there than at Northeast. (Tr. at 427-28); KCMSD Exhibit 1 at § 11 p. 35. Locating the program at Northeast would require the acquisition of two city blocks currently containing housing and a school, while locating the program at the Jewish Community Center would require no property acquisition. (Tr. at 352-53). Additionally, the Northeast Middle SAC felt that the Classical Greek theme was inappropriate for the area due to the necessity of land acquisition. (Tr. at 438). Thus, the Court will approve the shifting of the Classical Greek theme from Northeast Middle School to Middle II.

The State opposes the KCMSD's proposed Global Studies theme at Northeast Middle by arguing that the proposal is vague and poorly planned. The Global Studies them is based upon social studies with a strong foreign language component. (Tr. at 355). Students can also place an emphasis on governmental studies and geography. KCMSD Exhibit 1 at § 11 p. 37. This theme will allow students from the elementary foreign language

program to exploit the fact that they do know a foreign language. (Tr. at 356-57, 449). As there are no foreign language high schools, the Global Studies theme will be a feeder program for the International Studies program at Southeast High School and the Law and Public Services program at Northeast High School. (Tr. at 356-57, 449); KCMSD Exhibit 1 at § 11 p. 37. Parents and teachers believe the Global Studies theme is ideal for Northeast, (Tr. at 438-39), and with thirteen different nationalities represented at the school the program is appropriate (Tr. at 453-52). The Court will approve the Global Studies theme at Northeast Middle. The Court will also approve the following Global Studies them budgets proposed by the KCMSD: $477,184 in 1989-90, $805,690 for 1990-91, and $792,350 for 1991-92.

The State has three bases of opposition to the KCMSD's proposal to defer the Southeast Elementary II Gifted and Talented theme to a school in a later phase and to replace the theme with a second Montessori school at Southeast III. First, the State argues that the KCMSD is facing a shortage of appropriately certified Montessori staff; second, the State believes it is unnecessary to assign the Gifted and Talented theme to a school to be opened in a later phase; and third, the State argues that the Montessori school will reduce the capacity of Southeast III, but the KCMSD has not indicated how this will affect overall capacity and building needs. The KCMSD is currently studying the gifted and talented program and would like to consider the gifted and talented magnet at the same time. (Tr. at 342). The Montessori theme has been very attractive and successful in desegregating at New Faxon. (Tr. at 342, 425, 460-61). Mr. Frank Vincent, the principal at New Faxon, testified that he agreed with the KCMSD's request for another Montessori program and that it would help the KCMSD meet its desegregation needs and the needs of the children. (Tr. at 461). The LRMP states that "data on initial enrollment at the Montessori . . . elementary [magnet] may indicate that [it] should be replicated or modified." LRMP at 6. The Court will approve the deferral

of the Southeast III Gifted and Talented theme to a school in a later phase and the replacement of that theme with a Montessori theme at Southeast III. The Court will approve the following budgets proposed by the KCMSD for the Montessori theme: $182,293 for 1989-90, $487,027 for 1990-91 and $554,429 for 1991-92.

PLAINTIFFS' MOTION TO MODIFY PRIOR REMEDIAL ORDERS

Martin Luther King, Jr., Middle School

Plaintiffs request a one-year delay in the scheduled September 1989 opening of the Latin Grammer middle magnet at Martin Luther King, Jr., Middle School to enable the KCMSD to complete educational planning and to execute an effective recruiting campaign. The KCMSD responded with a proposal to open King in 1989-90 at an annex with only a sixth grade for 125 students to provide continuity for fifth grade students at Pinkerton Latin Grammer Elementary. Plaintiffs agreed to the KCMSD's proposal. The DMC declined to support the opening of the King Middle sixth grade at its May 18, 1989, meeting. DMC Letter of May 18, 1989, to the Court at 3.

The Court cannot approve the proposal to open the sixth grade at King Middle School. As of May 31, 1989, only 15 students were expected to enroll at the King sixth grade in 1989-90 while the school's capacity is 125 students. Magnet School Placement Status Report of May 31, 1989. The KCMSD filed a supplemental memorandum on June 26, 1989, indicating that 35 students were expected to enroll at King in 1989-90. KCMSD's Supplemental Memorandum Regarding Martin Luther King, Jr. Latin Grammer Sixth Grade Center at 3. To attempt to open such an underutilized facility would result in a waste of time, effort and expense by all involved. The problems and delays in the opening of King are the result of poor planning by the KCMSD and a lack of continuity in the KCMSD personnel involved with King. Dr.

Joan Caulfield, assistant superintendent who worked on the King sixth grade proposal, testified that she had only become aware of the difficulty at King in attracting a desegregated enrollment two or three weeks prior to the hearing and that she would be leaving the KCMSD on June 30, 1989. (Tr. at 190, 193, 201). The Court has expressed concerns regarding the KCMSD's planning process at the hearing and previously in this order. *See supra* p. 16. The Court stated at the hearing:

> And what has occurred is we have penalized some 625 students through lack of proper planning, is that about it? Had we opened that sixth, seventh and eighth grade middle school we would have had 850 or 900 students? . . . Well, somewhere along the line, someone in the administration of the Kansas City School District should have recognized that there was not proper planning being done. . . . What I am trying to do, I am trying to point out this sort of thing has got to be eliminated. . . . There is someone in the Kansas City School system that should know where that responsibility lies.

(Tr. at 205-07). Such poor planning cannot be tolerated any longer.

Dr. Caulfield testified that it would be "extremely difficult" to fully open King in 1989-90. (Tr. at 196). Therefore, the Court has no alternative but to reluctantly grant the plaintiffs' original proposal for a one-year delay in the opening of King. The KCMSD is directed to submit to the Court proposed budgets for King for 1989-90, 1990-91 and 1991-92 on or before August 31, 1989. Once again, the Court warns that those person responsible for the King Middle School planning process may be held in contempt of Court if the planning process for King is not improved and grades six through eight are not implemented as planned at King in 1990-91. If proper planning does not occur, desegregation funds will not be approved for King.

Salary Study

Plaintiffs propose a comprehensive study of the salary rates and structure by which the KCMSD compensates certified and non-certified employees arguing that the salary structure may be impeding the KCMSD's ability to implement the desegregation plan. The State counters that the KCMSD's personnel problems may be unrelated to salaries. Dr. Stewert testified that the study needs to be more thorough and include job satisfaction, professional working conditions, environment and fringe benefits. (Tr. at 804). The study should also analyze the tuition reimbursement program, staff development, reduced class time, etc. (Tr. at 805). Subsequently, plaintiffs proposed to amend their motion to incorporate Dr. Stewert's [sic] suggestions. Plaintiffs request that the study be conducted by an independent organization with the contract awarded and administered by the DMC. Plaintiffs request that the DMC be allowed to submit a proposed budget to the Court.

It is apparent that the KCMSD has had difficulty in both hiring and retaining qualified personnel. *See, e.g.*, Plaintiffs' Exhibit 1 at 2-3; (Tr. at 190, 504, 516). Although Dr. Stewert testified that such problems are not unique to the KCMSD, (Tr. at 803), such problems do affect the desegregation plan.

> There are . . . instances where the KCMSD has experienced difficulty in hiring teachers and administrators needed to implement the desegregation orders, due, in significant part, to salary considerations.
>
> * * *
>
> It is difficult to determine to what extent the KCMSD may have been impaired by salary considerations in its ability to implement the desegregation orders. However, it is reasonable to conclude that there has been some impairment resulting from salary factors. Much of the anecdotal

> information . . . describes difficulties in hiring and/or retaining administrators in magnet schools during the magnet planning period or in the critical first two years of implementation.

Plaintiffs' Exhibit 1 at 3. The KCMSD School Board is concerned about is ability to implement the desegregation plan in light of the salary structure. (Tr. at 503-04). Dr. Stewart testified that the KCMSD frequently should conduct an analysis of its ability to attract and retain professional staff. (Tr. at 803). Because such an analysis will affect the implementation of the desegregation plan, the Court will approve plaintiffs' request for a study of the KCMSD's ability to hire and retain staff. The study is to be conducted by an independent organization and to be administered by the DMC. The DMC is directed to submit a proposed budget to the Court for approval as soon as the necessary information can be obtained and compiled.

New Positions

Plaintiffs propose the creation of two positions for a greenhouse technician and an animal technician for 1989-90 and two positions for a science librarian and a planetarium manager for Southwest High School in 1990-91. Plaintiffs argue that the greenhouse technician is needed to supervise and maintain the eight greenhouses mandated by the LRMP. The State opposes the position by arguing that existing curriculum coordinators, resource teachers and staff can operate the greenhouses. Each greenhouse is very different and each contains a variety of things that can go wrong. (Tr. at 540, 634, 647). No one is responsible for taking care of the greenhouses during the summer and on weekends and holidays. (Tr. at 541, 634-35). A greenhouse technician could alleviate these problems and allow the greenhouses to be utilized to their fullest extent by teachers and students. The technician can also help the KCMSD avoid costly greenhouse repairs, possibly resulting in an overall total savings to the KCMSD. The Court will approve the creation of the

position of greenhouse technician and will also approve plaintiffs' proposed budget of $31,250 for the position.

Plaintiffs argue that an animal technician is needed to help supervise and maintain the LRMP animal facilities, to develop the LRMP Zoo Education Project and to work with the "critter program." The State argues that animal care should be provided by previously funded KCMSD personnel or volunteers. The KCMSD must comply with city codes and government regulations regarding animal care. (Tr. at 548-50). A technician could assure that the KCMSD complies with all codes and regulations and could also diagnose and care for sick animals, (Tr. at 551, 601-02), along with providing general care for the animals. The technician would be responsible for the care of the animals during the summer and on weekends and holidays. Additionally, a technician can provide economy and efficiency in the procurement of animals, food, bedding and housing. (Tr. at 621-22). The Court will approve the creation of the position of animal technician and will also approve plaintiffs' proposed budget of $31,250 for the position.

Plaintiffs argue that a science librarian is necessary for 1990-91 at Southwest High School because the science library mandated by the LRMP is separate from the main library and, therefore, one librarian cannot oversee both libraries simultaneously. The State counters that the LRMP did not intend for a separate science library to be constructed and that other school personnel can service the library with the help of one librarian. The science library is located near the science labs on a different floor than the main library and in the opposite corner of the building. (Tr. at 553, 649). Two librarians would be required to keep both libraries open at the same time. (Tr. at 554A, 649, 654, 671). The science librarian can also aid students in science and math research. (Tr. at 554). The Court will approve the position of science librarian at Southwest and will approve the proposed 1990-91 budget of $39,000. Nonetheless, it does appear to the

Court that the two separate libraries at Southwest are somewhat inefficient. The Court cautions that in the future more efficient planning is necessary for such capital improvements; otherwise, desegregation funds for such inefficiencies will not be approved.

Plaintiffs request funding for the position of planetarium manager at Southwest High School in 1990-91 arguing that the position is necessary for operating the expensive planetarium equipment, developing demonstrations and presentations and caring for and maintaining the equipment. The State counters that staff development funds could be used to train existing personnel to operate the planetarium. A planetarium manager could design planetarium programs and know the technical aspects of the equipment. (Tr. at 559, 561, 661-62, 673). The manager could also take care of and maintain the equipment. (Tr. at 662). The position would allow full utilization of the planetarium facilities. (Tr. at 561-62, 673). Ms. Marilyn Miles, a curriculum coordinator for the KCMSD who operated a planetarium for six years, testified that the planetarium could not be operated without a planetarium manager.(Tr at 661). The Court will approve the position of planetarium manager at Southwest and the proposed 1990-91 budget of $45,000.

DESEGREGATION MONITORING COMMITTEE

Budget

On many occasions the Court has emphasized the importance of the DMC to the Court and the desegregation plan. The DMC is an arm of the Court and has shown itself to be an effective and impartial group committed to achieving the goals outlined in this Court's desegregation plan. The Court will approve a DMC budget of $243,432 for 1989-90. The Court will approve a per diem budget component totaling $24,800, which consists of an increase in compensable hours to 180 hours for the general chairperson, 150 hours for committee chairpersons and 130 hours for committee members. A research budget of $54,200 is

approved, along with a $35,500 operating budget. The Court will approve a staff operating budget of $128,932, which includes a 5.1% salary increase and FICA payments.

Appointments

On June 15, 1989, the Court conducted interviews of nominees for the DMC for two year appointments to begin July 1, 1989. The Court makes the following appointments to the DMC:

General Chairperson
Eugene Eubanks

Desegregation Subcommittee
Dr. James Oglesby — Chairperson
Susan Stanton
Javier Perez

Budget Subcommittee
Kenneth Kraft — Chairperson
Pat Jordan
Tom Bixby

Education Subcommittee
Dr. Miguel Sancho — Chairperson
Deborah Neal
John Cozad

Voluntary Interdistrict Transfer Subcommittee
Carl DiCapo — Chairperson
Chuck James
Derek Holland

Although Mr. Ed Drake and Dr. Agapito Mendoza were not reappointed to the Education and Voluntary Interdistrict Transfer Subcommittees, respectively, the Court wishes to emphasize that this is in no way a reflection upon the performance of Mr. Drake or Dr. Mendoza. When the last DMC appointments were made, the Court inadvertently failed to appoint a state nominee

to the Education and Voluntary Interdistrict Transfer Subcommittees. As a result, the Court has appointed State nominees John Cozad and Derek Holland to the Education and Voluntary Interdistrict Transfer Subcommittees, respectively, to correct its past error. The Court wishes to express its gratitude to Mr. Drake and Dr. Mendoza for their DMC service.

Southeast Elementary I

At its meeting of May 24, 1989, the DMC moved to advise the Court to order the postponement of the implementation of the Southeast Elementary I Classical Greek program to the fall of 1990. DMC Letter of May 24, 1989, to the Court at 2. As of May 31, 1989, Southeast had an expected enrollment of 23 students with a capacity for 438 students. Magnet School Placement Status Report of May 31, 1989. Based upon these figures and the DMC's 10-0 vote in favor of postponing the opening of Southeast I, the Court does not believe that Southeast I can be successfully opened in 1989-90. Therefore, the Court will order that the opening of Southeast Elementary I be postponed until 1990-91. Based upon this ruling, the KCMSD is directed to submit proposed budgets for Southeast I for 1989-90, 1990-91 and 1991-92 to the Court for approval on or before August 31, 1989.

STATE'S MOTION TO STRIKE

The State filed a motion to strike plaintiffs' reply brief arguing that plaintiffs are attempting to bring in new evidence by affidavits after the hearing and that the State has not had an opportunity to examine plaintiffs' affiants on the matters discussed in their affidavits. Plaintiffs respond that the reply brief and affidavits are appropriate pursuant to Fed.R.Civ.P. 43(e). Fed.R.Civ.P. 43(e) provides: "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." This

rule gives the Court discretion to choose between hearing oral testimony or taking affidavits in making factual judgments on the motion in question. *Murray* v. *Kunzig*, 462 F.2d 871, 878 (D.C. Cir. 1972), *rev'd on other grounds*, 415 U.S. 61 (1974). Thus, the Court may decline to accept affidavits that are offered and insist on oral testimony. *Id.* The Court will not decline to accept affidavits and insist on oral testimony in this instance. Therefore, the State's motion to strike plaintiffs' reply brief will be denied.

CONCLUSION

The budgets approved previously in this order shall be allocated 25% to the KCMSD and 75% to the State, unless provided otherwise, with joint and several liability. Following are summaries of the budgets approved by the Court:

1989-90 Desegregation Budget

	Total	KCMSD'S Contribution	State's Contribution
AAA	$6,231,123.00	$2,939,316.75	$3,291,806.25
1986-87 Magnets	$14,805,851.00	3,701,462.75*	11,104,388.25*
Effective Schools	7,025,000.00	1,756,250.00	5,268,750.00
Base Budgets	9,594,079.00	2,398,519.75*	7,195,559.25*
Early Childhood Education	3,607,545.00	901,886.25	2,705,658.75
Extended Day	405,000.00	101,250.00	303,750.00
Full Day Kindergarten	1,773,185.00	443,296.25	1,329,888.75
Class Size Reduction	8,787,191.00	4,393,595.50	4,393,595.50
District Communications	30,725.00	7,681.25	23,043.75
Research and Evaluation	5,060.00	1,265.00	3,795.00
Summer School 1989	1,435,097.00	358,774.25	1,076,322.75
Debt Service	-0-	0-	-0-
Uniforms	47,680.00	11,920.00	35,760.00
Latin Grammer Computers	173,700	43,425.00	130,275.00
Art and Music Teachers	-0-	-0-	-0-
Suzuki Teachers	open	open	open
Defensive Driving Program	-0-	-0-	-0-
Magnet Extended Day	-0-	-0-	-0-
AVATS	3,164,068.00	791,017.00	2,373,051.00
Music Accompanists	37,875.00	9,468.75	28,406.25
Elementary I	-0-	-0-	-0-

Elementary II	-0-	-0-	-0-
Elementary III	-0-	-0-	-0-
Middle I	537,184.00	134,296.00	402,888.00
Northeast Middle	477,184.00	119,296.00	357,888.00
Southeast III	182,293.00	45,573.25	136,719.75
King Middle	open	open	open
Salary Study	open	open	open
Greenhouse Technician	31,250.00	7,812.50	23,437.50
Animal Technician	31,250.00	7,812.50	23,437.50
DMC	243,432.00	60,858.00	182,574.00
Southeast I	open	open	open
Totals	58,625,772.00*	18,234,776.75*	40,390,995.26*

*To be adjusted as previously set forth in this order.

The following budgets were approved by the Court for 1990-91 and 1991-92:

Future Desegregation Budgets

	1990-91	1991-92
Uniforms	39,360	39,360
AVATS	3,079,907	2,673,070
Music Accompanists	39,769	41,758
Middle I	890,690	852,350
Northeast Middle	805,690	792,350
Southeast III	487,027	554,429
King Middle	open	open
Science Librarian	39,000	open
Planetarium Manager	45,000	open
Southeast I	open	open

Accordingly, it is hereby

ORDERED that the KCMSD's motion to amend its motion for approval of a desegregation plan for 1989-90 is granted; and it is further

ORDERED that the KCMSD's motion for approval of a desegregation plan for 1989-90 is granted as set forth in this order; and it is further

ORDERED that plaintiffs' motion for program and budget modifications of prior remedial orders is granted as set forth in this order; and it is further

ORDERED that the KCMSD shall submit 1986-87 magnet budgets for 1988-89 and 1989-90 as set forth in this order on or before August 31, 1989; and it is further

ORDERED that the KCMSD shall submit the amount of costs avoided elsewhere in the base budgets for 1988-89 on or before August 31, 1989, and for 1989-90 as soon as the amount is available; and it is further

ORDERED that the KCMSD shall submit a proposed budget for 1989-90 for Suzuki teachers on or before August 31, 1989; and it is further

ORDERED that the parties shall file briefs on the issue of whether Elementary I, II and III were ordered as magnet schools under the LRMP or the LRCIP on or before August 31, 1989; and it is further

ORDERED that the KCMSD shall submit proposed budgets for King Middle School for 1989-90, 1990-91 and 1991-92 on or before August 31, 1989; and it is further

ORDERED that the DMC shall submit a proposed salary study budget as soon as the necessary information can be obtained and compiled; and it is further

ORDERED that DMC appointments for two year terms to begin on July 1, 1989, are made as set forth in this order. and it is further

ORDERED that the DMC's budget request and request for postponement of the opening of Southeast I are granted as set forth in this order; and it is further

ORDERED that the KCMSD shall submit proposed budgets for Southeast Elementary I for 1989-90, 1990-91 and 1991-92 on or before August 31, 1989; and it is further

ORDERED that the State's motion to strike plaintiffs' reply brief is denied.

/s/ Russell G. Clark
RUSSELL G. CLARK,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Dated: July 5, 1989

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4
KALIMA JENKINS, *et al*,
Plaintiffs,
v.
STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

[Filed: April 23, 1990]

Upon consideration of the Joint Stipulation of All Parties Concerning Desegregation Budget for Year VI ("Joint Stipulation"), filed by the plaintiffs, KCMSD, the State of Missouri defendants, and AFT Local Union 691, and in consideration of the entire record herein, it is hereby

ORDERED, that the following components, as presented in KCMSD's Motion for Approval of Desegregation Plan for 1990-91 and the Joint Stipulation, are approved, with budgets summarized as follows:

	1990-91	1990-91 KCMSD Obligation	1991-92	1991-92 KCMSD Obligation
Early Childhood Development Program	$3,598,491	$899,623	Open	Open
Extended Day - Traditional Schools	$453,000	$113,250	Open	Open
Increased Funding for Printing and Advertising for Recruitment of Desegregation Personnel	$70,000	$17,500	$80,000	$20,000

Educational Enhancements for King Latin Grammar Middle School	$113,375	$28,344	$117,647	$29,412
Artists-in-Residence Program for Kansas City Middle School of the Arts	$45,000	$11,250	$45,000	$11,250
Music Accompanists for New Paseo Creative Visual and Performing Arts High School	$34,902	$8,726	$36,643	$9,161
Swimming Technicians for Classical Greek Elementary Schools	$73,911	$18,478	$77,607	$19,402
Computers and Software for New Southeast II Computers Unlimited and Richardson Computers Unlimited Elementary Schools	$1,521,550	$350,388	Open	Open
Westport Communications/ Writing Magnet Sch ool Computer Equipment	$157,500	$17,500	Open	Open
Westport Communications/ Writing/Writing Audio/ Video Technician	$32,345	$8,086	$33,962	$8,491
Magnet Extended Day*	$200,000	$50,000	$200,000	$50,000
Desegregation Support for Transportation	$754,286	$188,572	$604,859	$151,215
Animal Technician	$32,812	$8,203	$34,453	$8,613
Greenhouse Technician	$32,812	$8,203	$34,453	$8,613

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* As provided in KCMSD's Motion, the Extended Day programs for Knotts and Pinkerton, totalling $200,000 per year for the next two years, will be funded with unexpended LRMP funds from Year III and IV with no reduction in existing programs.

IT IS FURTHER ORDERED that the funding for the district task forces in the Long-Range Magnet School Plan and budget at $75,000 per year for the next two years (1990-91 and 1991-92) shall be allocated to support all eight of the magnet theme task forces, for themes that are undergoing implementation as well as those themes already implemented. The district task forces shall provide written notices of their meetings, minutes of their meetings shall be provided to the DMC and the parties, and at the first meeting of each task force each year there shall be adopted procedures and objectives for the task forces.

IT IS FURTHER ORDERED that the Admissions Guidelines in the Long-Range Magnet School Plan will be amended to provide that first-time enrollment in foreign language immersion programs in grades two and higher will be limited to students with a demonstrated proficiency to their grade level in the second language.

IT IS FURTHER ORDERED that the following components presented in KCMSD's Motion for Approval of Desegregation Plan for 1990-91 and Plaintiffs' Motion for Year VI Program and Budget Modifications are approved with the following modifications, with budgets summarized as follows:

* The component titled "Recruitment Plan" in KCMSD's Year VI Motion is modified to substitute a Recruiter/Ombudsperson for the Ombudsperson provided in the plan. The Recruiter/Ombudsperson will report to the Coordinator of Recruitment. It is further ordered, on agreement of all parties, that the position of Grants Specialist provided in the Long-Range Magnet School Plan will be eliminated. *(See* November 12, 1986 Order at Attachment A, page 1.) The following budget reduction for salary and fringe benefits will be implemented due to the elimination of this position:

Grants Specialist	($56,683)		($59,517)	
Recruitment Plan	$442,286	$110,572	$397,216	$99,304

* The component titled "Summer School-1991" in KCMSD's Year VI Motion is modified to eliminate the Tech 9 position. The modified budget is:

Summer 1991	KCMSD's Obligation
$2,310,967	$577,742

* The component in KCMSD's Year VI Motion titled "Effective Schools" is modified to reinstate the $100,000 that was deleted for the closing of North Rock Creek Elementary School.

1990-91	1990-91 KCMSD Obligation	1991-92
$7,250,000	$1,812,500	Open

* The component in the Plaintiffs' Year VI Motion titled "Modifications to the College Stipends (TTAP) and Staff Stipends (Teacher Reimbursement) Programs" is modified by the agreement of the parties that if at the end of the 1991-92 school year the KCMSD has not expended eighty-five percent (85%) of any 1991-92 budget line in the College Stipends or Staff Stipends programs as modified by this stipulation none of the parties to this agreement will seek from the Court any extension, realignment, or continuation of such program budget lines.

	1990-91	KCMSD Obligation	1991-92	KCMSD Obligation
TTAP Grants	$400,000		$375,000	
Advertising/Printing	$55,000		$45,000	
Creation and Distribution of Fliers and New Brochures	$15,000		$5,000	
Staff Development	$2,500		$2,500	
Promotional Materials about Kansas City and KCMSD	$7,500		-0-	
Staff Travel to Promote TTAP	$15,000		$10,000	
Visits to KCMSD by Finalists and Spouses	$15,000		$10,000	
Full-time Secretary and Benefits	$24,000		$26,000	
TTAP total	$534,000	$133,500	$473,500	$118,375

	1990-91	KCMSD Obligation	1991-92	KCMSD Obligation
Staff Stipend (TTRP): Funds for Montessori Training Including Travel	$110,00		$150,00	
Funds for Tuition for Alternative Certification Program	$15,000		$15,000	
Funds for Tuition Reimbursement for Aides and Paraprofessionals	$5,000		$5,000	
Increase for General TTRP Budget	$50,000		$50,000	
TTRP Total	$180,000	$45,000	$220,000	$55,000

IT IS FURTHER ORDERED, upon review of section 4 of the Joint Stipulation concerning components on which limited issues are reserved by the parties, that the Court will receive briefs on the schedule agreed to by the parties, limited to the issues set forth in the Joint Stipulation.

/s/ Russell G. Clark
Russell G. Clark, District Judge
United States District Court

Dated: April 23, 1990

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, et al,
Plaintiffs,
v.
STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: May 14, 1990]

A voluntary interdistrict transfer (VIT) proposal has been presented to the court by the plaintiffs and the School District of Kansas City, Missouri (KCMSD). Upon the joint suggestion of all parties to this cause of action, the State of Missouri defendants are ordered to (1) meet with representatives of public school districts having less than twenty-five percent (25%) minorities enrolled and located within Clay, Platte, and Jackson Counties and with the parties to this case, (2) provide to them and explain the proposed VIT plan attached hereto, (3) obtain agreements of the school districts to participate in the VIT plan, and the number of students each will accept in September, 1990, or their comments and/or suggestions for change, and (4) report on the State's discharge of these duties within thirty (30) days of this order. Suggestions or arguments by any entity as to the contents of the VIT plan will not be used as evidence of racial animus in any future proceeding. This court will hold a hearing on the status of this proposed VIT plan on the ____ day of June, 1990 beginning at _____.

/s/ Russell G. Clark
Russell G. Clark, Judge
United States District Court

Date: May 14, 1990

Kansas City Metropolitan Area

Voluntary Interdistrict Transfer Plan

I. *The Role of the State*

A. The State of Missouri shall establish and fund a voluntary interdistrict transfer ("VIT") program in the Kansas City metropolitan area. The State shall pay for the transportation and tuition costs of any Kansas City, Missouri School District ("KCMSD") minority student who wishes to transfer from a school within KCMSD in which their race is in the majority (with preferences for students from schools with enrollments of 90% or more minority students) to a school in another school district in Clay, Platte or Jackson County in which minorities constitute less than 25% of the student body. The tuition payment shall be reasonably determined by each participating school district. The State shall also pay KCMSD one-half of the foundation allotment for each student who transfers from the KCMSD under this plan or, in the alternative, if KCMSD sends more students than it receives, State aid based on the District's enrollment for the second prior year. The method of selection will be chosen annually by the KCMSD. The State shall be required to pay these VIT costs for up to 1,200 students in the 1990-91 school year, 2,400 students in the 1991-92 school year, 3,600 students in the 1992-93 school year, 4,800 students in the 1993-94 school year and 6,000 students in the 1994-95 school year and thereafter.

B. The State shall be required to fund the salary and expenses of one full-time counselor for every 50 KCMSD students who transfer to surrounding school districts ("SSDs") in the three-

county area under Section I.A. In addition, the State shall fund the staff development programs described in Section III.E.

C. The State shall fund the Interdistrict Recruiting and Counseling Committee ("IRCC") described in Section III.

D. In future years, the State's funding responsibilities shall continue and the State shall continue to encourage full participation by all SSDs. In particular, the State shall encourage SSDs to increase the number of transfers they accept in future years so that collectively they will meet the goals of Section I.A.

II. *Surrounding School Districts ("SSD")*

Each of the school districts in the three-county area described in Section I.A shall be eligible to participate in this plan if it is willing to accept an adequate number of transfer students to avoid isolation and to follow the provisions in Sections III and IV.

III. *Interdistrict Recruiting and Counseling, Committee ("IRCC")*

A. The IRCC shall be composed of one representative of each participating SSD, one KCMSD representative , one representative of AFT Local 691, one representative of the State and a representative of the plaintiffs. Each member of the IRCC shall have one vote and decisions will be made by majority vote. The committee shall select its own chair.

B. The IRCC shall meed within thirty days of the promulgation of this plan and shall present a proposed budget, including necessary staff, to the DMC within forty-five days of promulgation of this plan. The DMC shall present its recommendations to the Court within fifteen days of the IRCC's report.

C. The IRCC shall coordinate among participating SSDs the dissemination of information about available transfer opportunities and the establishment of application and acceptance dates

that will allow transfer students to make reasonable decisions about where to attend school in a timely manner.

D. The IRCC shall hire and supervise the counselors provided under Section I.B, who shall assist in assuring a smooth transition for transfer students and spend a proportionate amount of time at the suburban schools in which KCMSD transfer students are enrolled.

E. The IRCC will be responsible for assuring that an effective Multicultural/Human Relations Staff Development program is provided for the staffs of all SSDs which elect to participate in this program. This will include, among other things, a program offered in each SSD before the opening of school in the fall to sensitize school district staff to the needs of transfer students. Such programs shall continue annually so long as the IRCC determines they are necessary.

F. The IRCC shall facilitate participating districts' efforts to recruit minority transfers to the SSDs and non-minority applicants to KCMSD magnet schools and shall ensure that sufficient recruiting activities are conducted either by the participating districts or the IRCC itself.

G.The IRCC shall report four times each year to the DMC by February 1, May 1, August 1 and November 1 about progress and problems in implementing the plan. The IRCC shall include in all of its reports to the DMC and the Court the number of students participating in the current year and expected to participate in the subsequent year, enrollments by grade, race, school and resident/transfer status, information about its counseling and recruiting efforts, comments on transportation under the plan and any information specifically requested by the DMC or the Court or any relevant IRCC concerns about the plan.

H. The IRCC shall also develop standards to propose to the DMC and the Court to govern the transportation system described in Section V.

IV. *Admissions and Treatment of Transfer Students*

All SSDs receiving transfer students from the KCMSD shall agree to the following:

A . Transfer students will be accepted for initial acceptance to each district at all grade levels at which space is available.

B. Transfer students will be allowed to stay in the SSD until they graduate.

C. Transfer students shall be eligible to participate in all programs and activities on the same basis as resident students.

D.Participating SSDs will accept all applicants for available spaces who are eligible under the provision of Section I.A, except those with a history of serious disciplinary problems, on either a first-come-first-serve or random basis.

E. Participating SSDs agree neither to isolate nor to concentrate transfer students in one or a few schools or classrooms.

F. Participating SSDs agree to cooperate with IRCC counselors in helping transfer students adjust to their new school environments and to provide appropriate educational support.

V. *Transportation*

The State shall fund and manage a transportation system for transfer students in accordance with the guidelines developed by the IRCC, the DMC or the Court. These guidelines shall be designed to encourage participation in the transfer program and in extracurricular activities. They shall address maximum walking distances to bus stops and maximum ride times for students.

VII. *Staff*

A. The IRCC shall develop guidelines for voluntary participation in a teacher exchange program to increase the presence of

minority faculty and administrators in SSDs and to enhance the richness and variety of experience available to teachers in all participating districts. The IRCC shall present these guidelines to the DMC and the Court by February 1, 1991.

B. The IRCC shall assist participating districts in their efforts to recruit minority staff. The IRCC's efforts could include, among other things, the development of a central recruiting office to recruit and interview minority candidates for consideration by the SSDs.

VII. *Research and Evaluation*

The DMC shall be responsible for research and evaluation concerning the effectiveness of the Kansas City Metropolitan Area Voluntary Interdistrict Transfer Plan and shall report its conclusions to the Court.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al,
Plaintiffs,
v.
STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: June 26, 1990]

Before the Court is plaintiffs' motion for Year VI program and budget modifications and KCMSD's motion for approval of desegregation plan for 1990-91. Subsequently the parties filed a joint stipulation regarding certain issues in the KCMSD's and plaintiffs' motions. On April 23, 1990, the Court entered an order in accordance with the stipulations. Subsequently the State filed a memorandum on the remaining Year VI budget issues and the KCMSD and plaintiffs filed a joint response to the State's memorandum. The State filed a reply memorandum and the KCMSD and plaintiffs filed a joint response. Plaintiffs' motion for Year VI program and budget modifications and the KCMSD's motion for approval of desegregation plan for 1990-91 will be granted as set forth below.

AAA

In its order of July 25, 1988, this Court approved a 1990-91 AAA budget of $6,574,673, which the KCMSD solely responsible for $1,963,535. *Jenkins* v. *State of Missouri*, Order of July 25, 1988, at 21-24 (W.D. Mo. 1988). The KCMSD seeks a slightly reduced 1990-91 AAA budget of $6,569,389. In addi-

tion, the KCMSD proposes to use one of the Court-approved counselors to provide counseling services at Delano and the Teenage-Parent Center, two of the KCMSD's special schools. The State argues that the time has come for the KCMSD to solely bear the costs of maintaining AAA status. The KCMSD counters that the achievement and retention of AAA status is a proper desegregation expense. In addition, the KCMSD states that its operating budget is not sufficient to meet the requirements of AAA status. The retention of AAA status is a proper desegregation expense. *Liddell* v. *Board of Education of City of St. Louis*, 758 F.2d 290, 294 (8th Cir. 1985); *Liddell* v. *State of Missouri*, 731 F.2d 1294, 1318 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984); *Jenkins*, Order of July 25, 1988, at 24; *id.*, Order of July 6, 1987, at 10. Therefore, the Court will approve a AAA budget of $6,569,389 in 1990-91 with the KCMSD solely responsible for $3,111,035. In addition, the Court will approve the use of one counselor to provide counseling services at two of the KCMSD's special schools.

Reduction in Class Size

The Court previously approved a reduction in class size budget of $8,787,191 for 1990-91 stating that "[i]f student enrollments justify additional funding for . . . 1990-91, KCMSD may move the Court for such funding." *Id.*, Order of July 25, 1988, at 8. The KCMSD has determined that it can meet the Court-ordered class sizes with fewer teachers than the Court approved in the July 25, 1988, order, resulting in a 1990-91 budget request of $4,683,986. The KCMSD seeks to eliminate 31 approved positions at the elementary level, 38.5 positions at the middle school level and 72.5 positions at the high school level. The State does not oppose the KCMSD's budget request. Therefore, the Court will approve a reduction in class size budget of $4,683,986 for 1990-91 with the KCMSD solely responsible for $3,512,990 pursuant to the Court's order of July 5, 1989. *Id.*, Order of July 5, 1989, at 6-8.

Full-Day Kindergarten

The Court previously approved a full-day kindergarten budget of $1,773,185 for 1990-91 stating that "[i]f student enrollments justify increased or decreased funding for . . . 1990-91, the Court will make an appropriate modification." *Id.*, Order of July 25, 1988, at 14. The KCMSD has not requested a modification of the previously approved budget for 1990-91. The State does not oppose the full-day kindergarten budget request. Therefore, the Court will approve a full-day kindergarten budget of $1,773,185 for 1990-91 with the KCMSD responsible for $443,296 of that budget.

1986-87 Magnet Schools

Previously the Court refused to approve the KCMSD's 1990-91 budget for the 1986-87 magnets because the budget did not properly delineate between base operating costs and incremental magnet costs. *Id.*, Order of July 5, 1989, at 3-4; *id.*, Order of July 25, 1988, at 20-21. The KCMSD now seeks approval of a 1990-91 1986-87 magnet budget of $15,694,833 with $10,385,602 of this budget deemed a desegregation expense allocated 100% to the KCMSD.

In 1988-89 and 1989-90 the Court approved total 1986-87 magnet budgets as a desegregation expense and subsequently allowed the State a credit in the amount of base costs necessary to operate a traditional program at each school against the amount of their total desegregation obligation for 1988-89 and 1990-91, respectively, because base costs for the 1986-87 magnets are not a proper desegregation expense and the KCMSD should be solely liable for such costs out of its operating budget. *Id.*, Order of October 18, 1989, at 2-3; *id.*, Order of November 2, 1989, at 4-5; *id.*, Order of January 23, 1990, at 1-6. The State argues that the Court should approve only the 1986-87 magnet school incremental costs as a desegregation expense in 1990-91 with the base costs of these schools included in the KCMSD's

1990-91 operating budget. However, on February 1, 1990, this Court entered an order which suspended and stayed the Court's orders of October 18, 1989, November 2, 1989, and January 23, 1990. Therefore, the Court finds that the proposed budget of $15,694,833 for 1990-91 is reasonable and will approve such budget as a desegregation expense with $10,385,602 allocated 100% to the KCMSD. If the February 1, 1990, stay is subsequently lifted, the State shall be allowed a credit in the amount of the base costs necessary to operate a traditional program at each school against the amount of their total desegregation obligation for 1990-91.

Base Budgets

The KCMSD requests a 1990-91 budget for base budgets for New Paseo Middle School, Lincoln Middle School, New West Elementary, New Gladstone Elementary, Middle School I, Middle School II and Elementary III. In 1990-91 the KCMSD will also be opening four additional elementary magnet schools but is not requesting base budget funding for these schools because it is closing four traditional elementary schools in 1990-91. The State argues that the time has come to no longer fund the base budget magnets as a separate desegregation expense, but instead treat them like the schools under the LRMP. The Court has previously approved base budget components as a desegregation expense. *Id.*, Order of July 5, 1989, at 4; *id.*, Order of July 25, 1988, at 18-19. The base budget component is a proper desegregation expense because the district would not have been required to open and operate these new magnets but for the Court-ordered LRMP. The State offers no basis to the Court to revise the prior rulings regarding the base budget component. The State appears to be attempting to relitigate the issue of costs avoided elsewhere, which was addressed by this Court in its order of May 24, 1989. Therefore, the Court will approve the base budget component of $15,358,428 as a desegregation expense with the KCMSD's obligation totaling $3,839,607.

However, the State will be allowed a credit for the amount of costs avoided elsewhere as addressed by the Court in its order of May 24, 1989. The Court directs the KCMSD to submit the amount of costs avoided elsewhere for 1990-91 as soon as they are available.

Security

The maintenance plan approved by the Court as part of its September 15, 1987, order provides $170,022 for 1990-91 and 1991-92 to upgrade the KCMSD security program. The KCMSD now proposes to increase the security budget to $224,752 in 1990-91 and $428,339 in 1991-92 to continue the reorganization of the KCMSD security department as thefts become more costly as a result of the influx of educational equipment from the desegregation programs. The KCMSD argues that the proposal will provide a critical link in the recruiting effort and enable the KCMSD to protect more effectively the equipment that has been purchased in furtherance of the desegregation plan. The KCMSD's original proposal requested desegregation funds for ten additional site-based security guards, one new manager of site-based security officers, one new investigator and five additional patrol officer dispatchers. The KCMSD also proposed to extend the contracts of all sixteen site-based security guards from ten months to twelve months. The DMC took no exception to the ten additional site-based security guards and one new investigator, but did take exception to one new manager of site-based security officers nd five additional patrol officer dispatchers. DMC Minutes of March 19, 1990, at 10. The DMC determined that the non-site-based security initiatives proposed by the KCMSD were "too staff intensive," and urged the KCMSD "to develop a more cost-effective and efficient proposal which addresses internal security as well as external." *Id.* In response, the KCMSD eliminated the site-based manager position from the proposal, but retained the dispatchers "because of their importance to the District's effort to combat property losses."

KCMSD's Motion for Approval of Desegregation Plan for 1990-91 at 27. The State responds that security is a maintenance function which is not a proper desegregation expense. The KCMSD counters that proper security makes the KCMSD schools more desegregatively attractive and that much of the property the KCMSD is trying to protect is needed to carry out the desegregation plan.

The Court recognizes that security has become an important issue in the KCMSD. *See* Declaration of William M. Threatt, Jr., at ¶ 7. Proper security is vital to the desegregative attractiveness of the KCMSD. *See id.* at ¶ 8. During the 1988-89 school year alone there were 926 incidents reported to the KCMSD security department resulting in losses totaling $221,958. KCMSD's 1990-91 Year VI Desegregation Plan at 136. A large portion of the KCMSD's losses are attributable to electronic equipment purchased to implement the desegregation plan. Declaration of William M. Threatt, Jr., at ¶ 6. The Court has previously stated: "The Court recognizes that the security needs of the KCMSD . . . have changed dramatically as a result of the desegregation plan. It would be illogical for the Court to order implementation of a desegregation plan calling for new and renovated facilities containing new equipment, supplies and furniture without adequate security to protect such investments." *Jenkins*, Order of March 30, 1989, at 2-3. In the March 30, 1989, order the Court granted the KCMSD's request to recognize summer security expenses as desegregation expenses. Therefore, the Court finds that the KCMSD's request for security funds is a proper desegregation expense. However, the Court will not approve the KCMSD's request for five additional patrol officer dispatchers to which the DMC took exception. The KCMSD shall file a proposed budget for security for 1990-91 and 1991-92 deleting the five additional patrol officer dispatchers on or before July 13, 1990.

Desegregation Monitoring Committee

As this Court has stated many times before, the DMC is an arm of the Court and has shown itself to be an effective and impartial group committed to achieving the goals outlined in this Court's desegregation plan. *See, e.g., id.*, Order of July 5, 1989, at 26; *id.*, Order of July 25, 1988, at 5. The Court cannot over emphasize the importance of the DMC to the Court and the desegregation plan. The Court will approve a DMC budget of $416,655 for 1990-91. The Court will approve a per diem budget component totaling $116,300, which consists of an increase in compensable hours to 225 hours for the general chairperson, 188 hours for committee chairpersons and 163 hours for committee members. Such an increase is warranted, as the DMC members spend many hours on DMC matters for which they are re not compensated. *See* Attachment A. A research budget of $54,200 and an operating budget of $35,000 will be approved. The Court will approve a staff compensation budget of $211,155, which includes a six percent salary increase for the executive secretary and administrative assistant, addition of benefits for the administrative assistant and the addition of two evaluators to the staff to assist with the day-to-day program monitoring and general assessment of the implementation of the plan. The Court will also approve a carryover of the balances of the fiscal year 1990 accounts to the 1991 fiscal year, which will result in a credit to the State and the KCMSD against their respective share of the funding.

Conclusion

The budgets approved previously in this order shall be allocated 25% to the KCMSD and 75% to the State, unless otherwise provided, with joint and several liability.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for Year VI program and budget modifications is granted as set forth in this order; and it is further

ORDERED that the KCMSD's motion for approval of desegregation plan for 1990-91 is granted as set forth in this order; and it is further

ORDERED that the DMC's budget request is granted as set forth in this order; and it is further

ORDERED that the KCMSD shall file a proposed security component budget for 1990-91 and 1991-92 on or before July 13, 1990; and it is further

ORDERED that the KCMSD shall submit the amount of costs avoided elsewhere for 1990-91 as soon as they are available.

/s/ Russell G. Clark
RUSSELL G. CLARK, JUDGE
UNITED STATES
DISTRICT COURT

Date: June 26, 1990

PER DIEM REPORT - AS OF 4/30/90

Member	Hours Compensated	Hours Uncompensated (as of 4/30/90)	Total (1st 10 mos.)	Hr. Remaining (where compensation is available)	Projected Yr. End Hours
Eubanks	180	72.75	252.75	-0-	318.9
Oglesby	47	-0-	47	103	56.4
Perez	66.75	-0-	66.75	63.25	80.1
Stanton	68.75	-0-	68.75	61.25	80.1
Kraft	150	12.50	162.50	-0-	195
Jordan	99.25	-0-	99.25	30.75	119.15
Bixby	114.75	-0-	114.75	15.25	114.25
Sancho	150	28.25	178.25	-0-	226.80
Neal	95	-0-	95	35	114
Cozad	49.25	-0-	49.25	80.75	59.1
DiCapo	119.75	-0-	119.75	30.25	153.3
James	130	9.25	139.25	-0-	167.1
Holland	58	-0-	58	73	72
TOTALS	1,328.50	122.75	1,451.25	491.50	1,799.2

APPENDIX N

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

v.

THE STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: July 23, 1990]

Pending before this Court are Plaintiffs' Motion for Year VI Program and Budget Modifications, filed March 21, 1990, AFT Local 691's Motion for Year VI Program and Budget Modifications, filed April 3, 1990, and KCMSD's Supplemental Motion for Approval of Salary Increases as Part of the Desegregation Plan for 1990-91, filed April 9, 1990, in which the three movants allege that in order to fully implement this Court's desegregation orders it is essential for the Kansas City, Missouri, School District ("KCMSD") to increase the level of salaries paid to its employees in order to attract and retain qualified employees essential for these purposes. Salaries in the KCMSD have been an issue in this litigation since early 1989, when plaintiffs moved this Court for funding of a comprehensive salary study for the KCMSD and that request was approved by the July 25, 1989 Order of this Court. Salary increase matters were raised before the Desegregation Monitoring Committee ("DMC") in February, 1990, heard by that Committee in March, and motions were filed in this Court between March 21 and April 9, 1990.

The State has opposed these motions, denying the movants' factual and legal contentions. Extensive discovery, including more than 25 depositions, inspection of thousands of documents, and the exchange of interrogatories preceded a hearing on the salary issues. Over four days of trial were conducted in June. These matters were widely publicized in the media. Before completion of trial the parties agreed to a compromise of disputed claims and presented to the Court this Order as proposed by them. Based on the entire record herein, the agreement of the parties and this Court having held a hearing on July 17, 1990, the Court finds the Agreement of the parties to be a fair, reasonable, and adequate settlement. It is therefore ORDERED:

1. The Kansas City, Missouri, School District is authorized to increase its salaries paid to its employees during the 1990-91 and 1991-92 school years by a total of up to $68 million. Over that two-year period, the State shall pay $34 million of that increase, and the Kansas City Missouri, School District shall pay the remainder, with no joint and several liability.

2. The State of Missouri shall pay to the Kansas City, Missouri, School District the sum of $15 million as needed to fund salary increases for KCMSD employees for the 1990-91 school year and shall pay to KCMSD the sum of $19 million as needed to fund salary increases for KCMSD employees for the 1991-92 school year. The State shall deposit these funds in a separate interest-bearing account maintained by KCMSD with the interest earned on this account credited to the State's obligation under this Order. The proposed salary schedule for 1990-91 is attached hereto as Attachment A.

Cost of subdivision a) to e) of paragraph two shall be paid out of the $68 million authorized in paragraph one.

a. Salary increases shall be given to the following classifications of employees during the two years of this agreement:

i. Senior Curriculum Coordinators (there are nine such positions, four funded by the LRMP [two science, one foreign language, and one fine arts coordinator] and five funded by the operating budget, one social studies, one language arts, one reading, one math, and one science coordinator) from step one at $53,700 to highest step at $59,950.

ii. Central High School Computer Systems Manager from first step at $49,000 to highest step at $57,400.

iii. Central High School Compute Technician from first step of $38,000 to highest step of $44,800.

iv. Animal Assistant and Greenhouse Technician from first step of $31,000 to highest step of $33,800.

b. The KCMSD shall develop job requirements for every teaching and administrative position at every magnet school. Such job descriptions for teachers shall include experience, training or demonstrated interest in the subject matter of the theme of the magnet school. Such job descriptions for principals shall include experience, training, or demonstrated interest in the magnet theme except where the District is unable to appoint a candidate who satisfies such a criterion. In such instances the District may appoint a candidate with preferable administrative and managerial skills if it simultaneously adopts a plan by which such candidate may reasonably be expected to acquire familiarity with the theme. The Desegregation Monitoring Committee shall have the authority to monitor such plans and review their implementation. These job descriptions shall be adopted by September 1, 1990 and applicable to new teachers and administrators as well as those wishing to transfer into a magnet school. Staff assigned to magnet schools on or before September 1, 1990 shall have until September 1, 1992 to meet the requirements for their positions.

c. All staff assigned to magnet schools shall, in addition to the currently required forty hours of summer magnet theme staff development, participate in an additional forty hours of magnet theme in-service during the school year. In order to accomplish this the teacher's school year will be extended by five days and teachers in traditional schools will also be required to participate in forty hours of staff development during the school year.

d. The KCMSD shall plan and implement procedures to assure that the existing process for evaluating principals and teachers is actually utilized starting September 1, 1990. The KCMSD shall make a good faith effort to use the results of its evaluation process to improve the quality of performance of its personnel.

e. The District may fund increases in substitute teacher pay, compensation for staff supervision of extra-curricular activities, and the staff liability insurance funds. The District may also fund a five-day new teacher training program as proposed in the pending motions.

3. In order to fund the District's share of the $68 million increase, KCMSD is hereby authorized to increase its property tax levy rate for the 1990 and 1991 tax years by 96¢ per $100 assessed valuation, so that the total KCMSD property tax levy rate in each such year may be increased to $4.96. If at the end of the 1991-92 school year any of the $68 million remains unspent, one-half of the unspent funds shall be returned to the State, and KCMSD's one-half shall be credited toward its desegregation obligations.

4. The Court finds that the highest tax levy rate ever approved by KCMSD voters was $4.23, that the average tax levy rate of the highest three school districts in Jackson County is currently $4.46, and that the highest levy rate of any school district in Jackson County is currently $5.07. Pursuant to the decision of the United States Court of Appeals for the Eighth Circuit dated

August 19, 1988 and the decision of the United States Supreme Court dated April 18, 1990, this Court finds that the tax rate of $4.96 is a reasonable maximum tax levy rate for KCMSD to yield sufficient revenue to fund KCMSD's share of the salary increases authorized by this Order, and the Court hereby enjoins enforcement any and all laws of the State of Missouri that would prevent the Board of Directors of the Kansas City, Missouri, School District from increasing its tax levy rate to that level in order to fund these salary increases which movants contend, and the evidence at the conclusion of movants' case indicates, are essential to comply with this Court's desegregation orders.

5. In order to assure that the 96¢ levy rate increase will yield sufficient revenue to fund KCMSD's share of the salary increases authorized by this Order, KCMSD may seek to remove from escrow accounts established pursuant to State law, pending the disposition of any protest litigation, any taxes paid under protest. The State shall guarantee that KCMSD will be able to refund any taxes paid under protest on issues raised by this Order.

6. It is further ORDERED, based on the agreement of the parties, that KCMSD will, throughout the pendency of this Order, collect systematically and report periodically to the DMC and the parties appropriate data regarding the results of its recruiting efforts. KCMSD also agrees that it will within three months of the date of this Order begin implementation of a reorganization of its recruiting efforts by adopting a plan and schedule intended to improve the results of its personnel recruiting.

7. In agreeing to this Order, no party waives its rights with regard to positions taken in this litigation and each party specifically preserves its rights to make whatever arguments it deems appropriate with regard to these issues after the conclusion of the 1991-92 school year covered by this Order.

/s/ Russell G. Clark
Russell G. Clark
United States District Judge

Dated: July 23, 1990

AGREED TO FORM
AND CONTENT:

/s/ Arthur A. Benson II
Arthur A. Benson II
Counsel for Plaintiffs

/s/ Doyle R. Pryor
Doyle R. Pryor
Counsel for AFT Local 691

/s/ Allen R. Snyder
Allen R. Snyder
Counsel for the
School District

/s/ Michael J. Fields
Michael J. Fields
Counsel for the
State of Missouri

ATTACHMENT A

ATTACHMENTS A-1 through A-13:

SALARY SCHEDULES

ATTACHMENT A-1:	Teachers, Counselors & Home School Coordinators
ATTACHMENT A-2:	Administrators and Professionals
ATTACHMENT A-3:	Maintenance Personnel
ATTACHMENT A-4:	Technical Personnel
ATTACHMENT A-5:	Paraprofessionals
ATTACHMENT A-6:	Operating Employees
ATTACHMENT A-7:	Data Processing Personnel
ATTACHMENT A-8:	Food Service Workers
ATTACHMENT A-9:	Operating Supervisors
ATTACHMENT A-10:	Clerical Employees
ATTACHMENT A-11:	Security Officers
ATTACHMENT A-12:	Nurses
ATTACHMENT A-13:	Extra Pay Assignment Schedule 1990-91

1990-91

7/3/90

32 million

	INCREASES	FRINGE	TOTAL
Teachers (.7286)	$18,941,014	$2,941.540	$21,882,554
Administrators (.0832)	2,162,902	335,899	2,498,801
Professionals (.0104)	270,363	41,987	312,350
Technical (.0065)	168,977	26,242	195,219
Clerical (.0091)	236,568	36,739	273,307
Paraprofessional (.0506)	1,315,420	204,285	1,519,705
Nurses (.0032)	83,189	12,919	96,108
Operating (.0741)	1,875,682	349,815	2,225,497
Operating Sup. (.0013)	32,907	6,137	39,044
Maintenance (.0059)	149,346	27,385	177,199
Food Service (.0207)	523,976	97,722	621,698
Data Processing (.0018)	46,794	7,267	54,061
Security (.0045)	113,909	21,243	135,152
TOTAL	$25,921,047	$4,109,648	$30,030,695

DEDUCTIONS:

Substitute	$ 400,000*
Extra Pay	600,000
New Teacher In-Service	189,900
Reserve	779,405
TOTAL	$1,969,305

*Daily substitute pay increased from current $50.00 to $75.00.

ATTACHMENT A-1

TEACHERS, COUNSELORS AND HOME SCHOOL COORDINATORS

1990-91 SCHOOL YEAR

Step	Bach. Degree	Bach. + 12 Grad. Hours	Mast. or Bach. + 36 Grad. Hours	Master's +15 Grad. Hours	Master's + 32 Grad. Hours	Master's + 60 or Doctor's Degree
1	22,215	22,993	24,548	25,436	27,213	29,813
2	22,993	23,770	25,436	26,325	28,102	30,857
3	23,770	24,548	26,325	27,213	28,991	31,901
4	24,548	25,436	27,213	28,102	29,879	32,945
5	25,436	26,103	28,102	28,991	30,768	33,989
6	26,103	26,880	28,991	29,879	31,656	35,033
7	26,880	27,658	29,879	30,768	32,545	36,077
8	27,658	28,435	30,768	31,656	33,434	37,121
9	28,435	29,213	31,656	32,545	34,322	38,165
10	29,213	29,990	32,545	33,434	35,211	39,209
11	29,990	30,768	33,434	34,322	36,099	40,254
12	31,545	32,323	34,322	35,211	36,988	41,298
13			35,211	36,099	37,877	42,342
14			36,099	36,988	38,765	43,386
15			37,654	38,010	39,654	44,430

ATTACHMENT A-2 — ADMINISTRATIVE SALARY ACHEDULE

POSITION	Days In Work Year	No.	Step 1	No.	Step 2	No.	Step 3	No.	Step 4	No.	Step 5	No.	Step 6	TOTAL
Deputy Superintendent	261	0	76,650	1	78,704	0	80,759	0	82,813	0	84,868	0	0	78,704
Asst. Superintendent	261	0	66,439	0	68,904	1	70,958	3	72,869	2	74,593	0	0	469,849
Executive Director	261	0	64,501	0	66,375	2	68,170	1	70,433	4	71,584	0	0	illegible
Director	261	0	59,967	2	61,776	6	63,614	7	65,423	4	67,231	0	0	905,001
Secondary Principal	240	0	52,904	1	55,248	0	57,609	1	59.986	0	62,346	7	64,707	733,927
Middle Principal	240	0	48,576	1	50,728	1	52,896	4	55,078	2	57,245	6	59,413	794,905
Elem./Alt. Principal	225	0	42,298	1	44,340	2	46,442	3	48,499	2	50,572	47	52,659	2,858,839
Sec. Asst. Principal/C.I.	220	0	39,305	1	40,722	1	42,125	6	43,542	6	44,945	48	46,361	2,839,103
Elementary Asst. Principal	210	0	35,230	0	36,787	0	38,963	0	40,847	0	42,717	0	44,627	0
Supervisor	261	0	47,091	3	48,598	5	50,147	6	51,640	3	53,175	12	54,711	1,522,423
Coordinator/Spec 44 Week	220	0	37,045	0	38,327	0	39,619	0	40,894	2	42,189	0	43,444	84,378
Coordinator/Spec 12 Month	261	0	43,951	1	45,466	2	47,002	2	48,505	2	50,052	28	51,541	1,779,722
													GRAND TOTAL	12,530,755
													.1909759	2,162,902

PROFESSIONAL PAY SCALES

LEVEL	A	B	C	D	E	F
18	2,523	2,650	2,776	2,904	3,030	3,158
19	2,650	2,776	2,904	3,030	3,158	3,285
20	2,776	2,904	3,030	3,158	3,285	3,412
21	2,904	3,030	3,158	3,285	3,412	3,537
22	3,030	3,158	3,285	3,412	3,537	3,664
23	3,158	3,285	3,412	3,537	3,664	3,790
24	3,285	3,412	3,537	3,664	3,790	3,919

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI

HUMAN RESOURCES

SENIOR CURRICULUM COORDINATOR PAY RANGES

ANNUAL SALARY SCHEDULE

1990-1991

STEP 1	STEP 2	STEP 3	STEP 4	STEP 5	STEP 6
53,700	54,950	56,200	57,450	58,700	59,950

REVISED ATTACHMENT A-3

CURRENT YEAR
MARCH 1, 1990 ACTIVE DATA BASE

MAINTENANCE

	RATE	NO.	COST
Audio Visual Technician Electrician	12.23	7	178,898
Audio Visual Technician Electrician Foreman	12.64	1	28,399
Auto Mechanic	12.73	1	25,384
Brick Layer	12.33	2	51,479
Carpenter	12.34	17	837,935
Carpenter Shop Foreman	12.34	2	353,215
Door Closer Repairman/Carpenter	12.34	0	0
Electrician	12.57	14	363,331
Floor Layer	12.29	2	51,305
Furniture Repairman/Carpenter	12.34	0	0
Furniture Foreman/Carpenter	12.74	1	23,567
Glazier	12.33	3	77,298
Glazier Foreman	12.73	1	26,585
Grounds Foreman	12.70	1	26,187
Heavy Equipment Operator	9.79	0	0
Laborer	7.10	24	399,837
Laborer Foreman	9.16	2	38,251
Landscape/Motorpool Job Foreman	12.73	2	31,988
Landscaper	7.78	1	16,285
Locksmith/Carpenter	12.34	0	0
Machinist	12.57	2	52,476
Masonry Foreman	12.74	1	26,647
Office Machine Technician	12.23	3	76,632
Office Machine Foreman	12.64	0	0
Painter	12.38	23	394,585
Painter Job Foreman	12.69	23	79,694
Plasterer	12.36	4	101,384
(illegible)	13.58	7	198,561
(illegible) JOB FOREMAN	13.79	0	0
Roofer	12.33	3	77,219
Roofing Foreman	12.73	0	0
Sewer (illegible	12.37	1	25.197
Shades-Stage Equipment Repairman/Carpenter	12.34	0	0
Sheet Metal	12.39	14	367,938
Sheet Metal Job Foreman	12.99	1	27,127
Steamfitter	13.51	4	112,943
Tuckpointer	11.51	17	301,918
Tuckpointer Foreman	12.34	0	0
Warehouse Person	9.12	4	74,235
Warehouse Foreman	9.82	2	39,882
[Some numbers were almost illegible]	TOTALS	171	4,425,729

ATTACHMENT A-4

TECHNICAL PAY SCALE

LEVEL	A	B	C	D	E	F
1	1,245	1,317	1,389	1,459	1,533	1,602
2	1,317	1,389	1,459	1,533	1,602	1,675
3	1,389	1,459	1,533	1,602	1,675	1,748
4	1,459	1,533	1,602	1,675	1,748	1,819
5	1,533	1,602	1,675	1,748	1,819	1,892
6	1,602	1,675	1,748	1,819	1,892	1,962
7	1,675	1,748	1,819	1,892	1,962	2,034
8	1,748	1,819	1,892	1,962	2,034	2,105
9	1,819	1,892	1,962	2,034	2,105	2,178
10	1,892	1,962	2,034	2,105	2,178	2,250
11	1,962	2,034	2,105	2,179	2,250	2,320
12	2,034	2,105	2,178	2,250	2,320	2,393
13	2,075	2,146	2,217	2,287	2,358	2,428
14	2,146	2,217	2,287	2,358	2,428	2,499
15	2,217	2,287	2,358	2,428	2,499	2,571
16	2,287	2,358	2,428	2,499	2,571	2,640
17	2,358	2,428	2,499	2,571	2,640	2,712

ATTACHMENT A-5

PARAPROFESSIONAL PAY SCALE

LEVEL	A	B	C	D	E	F
1 No H.S. or GED	6.06	6.25	6.42	6.63	6.82	7.03
2 H.S. to 29 College Hours	6.37	6.59	6.79	6.99	7.20	7.37
3 30 to 59 College Hours	6.71	6.92	7.14	7.34	7.58	7.82
4 60 to 89 College Hours	7.06	7.29	7.53	7.75	7.97	8.23
5 90 to 119 College Hours	7.38	7.64	7.88	8.15	8.37	8.63
6 120+ College Hours	7.84	8.07	8.31	8.57	8.85	9.12
7 Parent Trainer		7.38				
8 Assistant Teacher					7.71	
9 Assistant Social Worker					7.71	
10 Transportation Paraprofessional					7.15 Per Trip	

ATTACHMENT A-6

OPERATING PAY SCALE

LEVEL	STEP 1	STEP 2	STEP 3	STEP 4
Custodian Fireman				
Class 1 and 2	10.44	10.59	10.76	11.00
Class 3 and 4	10.26	10.39	10.57	10.81
Relief Custodian Fireman	10.44	10.59	10.76	11.00
Fireman		8.52	8.69	9.06
Custodian I		7.68	7.93	8.51
Guard		7.52	7.68	8.13
Custodian II		7.23	7.45	7.81
Matron/Elevator Operator		6.69	6.83	7.15
Parking Lot Attendant		8.52		
Assistant Custodian Helper		7.35		
Temporary Summer Helper		7.35		
Building Checker		7.35		
Lead Custodian		8.01	8.26	8.84

ATTACHMENT A-7

DATA PROCESSING SALARY SCHEDULE

MARCH 1, 1990 ACTIVE DATA BASE

POSITION	No.	Step 1	No.	Step 2	No.	Step 3	No.	Step 4	No.	Step 5	No.	Step 6	No.	Step 7	No.	Step 8	TOTAL
Sr. Comm Analyst	0	34,227	0	35,708	0	37,189	0	38,671	0	40,153	0	41,635	0	43,115	0	44,598	0
User Liaison	0	25,929	0	27,411	0	28,892	0	29,336	0	31,855	0	33,337	0	34,818	0	36,301	0
Telephone Coordinator	0	18,669	0	19,409	1	20,151	0	20,891	0	21,632	0	22,354	0	23,107	0	23,855	20,151
PC/Local Network Analyst	0	25,929	0	27,411	0	28,892	1	30,374	0	31,855	0	33,337	0	34,818	0	36,301	30,374
DP Manager	0	41,487	1	42,969	0	44,449	2	45,931	1	47,413	0	48,895	0	50,376	0	51,858	182,244
Sr. Systems Programmer	0	37,338	0	38,819	0	40,301	0	41,782	0	43,264	0	44,746	0	46,227	0	47,710	0
Data Base Administrator	0	37,338	0	38,819	0	40,301	0	41,782	0	43,264	0	44,746	0	46,227	0	47,710	0
Senior Programmer/ Analyst	0	36,301	0	37,782	2	39,263	0	41,306	1	42,227	0	43,709	0	45,190	0	46,673	120,754
Systems Programmer	0	33,189	1	34,671	0	36,152	0	37,634	0	39,116	0	40,597	0	42,078	0	43,561	34,671
Programmer/Analyst	0	33,189	1	34,671	0	36,152	0	37,634	0	39,116	0	40,597	0	42,078	0	43,561	34,671
Sr. User Liaison	0	33,189	1	34,671	0	36,152	0	37,634	0	39,116	0	40,597	0	42,078	0	43,561	34,671
Jr. Programmer	0	23,855	0	24,892	0	25,929	2	26,966	0	28,004	0	29,041	0	30,078	0	31,115	53,933
Operation Controller	0	25,929	1	27,411	0	28,892	0	29,336	0	31,855	0	33,337	0	34,818	0	36,301	27,411
Hdwe Teck/Computer Operator	0	20,743	0	21,781	1	22,818	3	23,855	0	24,892	1	25,929	0	26,966	0	28,004	120,311
Lead Data Entry/ Data Control	0	18,669	0	19,409	0	20,151	1	20,891	0	21,632	0	22,372	0	23,113	0	23,855	20,891
Data Entry/ Data Control	0	15,558	0	16,298	0	17,039	0	17,780	0	18,520	0	19,261	1	20,002	0	20,743	20,002
Help Desck Technician	0	15,558	0	16,298	0	17,039	0	17,780	0	18,520	2	19,261	0	20,002	0	20,743	38,521
Report Distribution Clerk	0	15,558	0	16,298	0	17,039	0	17,780	0	18,520	0	19,261	0	20,002	0	20,743	0
Operations Scheduler	0	23,855	0	24,892	0	25,929	0	26,966	0	28,004	0	29,041	0	30,078	0	31,146	0
																GRAND TOTAL	738,605
																	46794.00

ATTACHMENT A-8

FOOD SERVICE PAY SCALES

LEVEL	A	B	C	D	E	F
Secondary Manager	374	384	394	404	413	424
Elementary Manager	291	285	290	300	307	
Porter	5.96	6.17	6.29	6.42		
Cashier	5.96	6.17	6.29			
Cook	5.96	6.17	6.29			
Helper	5.75	5.88				

REVISED ATTACHMENT A-9

THE SCHOOL DISTRICT OF

KANSAS CITY, MISSOURI

Human Resources Division

MAINTENANCE, GENERAL FOREMAN
AREA OPERATIONS MANAGER
BUILDING INSPECTOR
WAREHOUSE FOREMAN

MONTHLY (Calendar) SALARY SCHEDULE

Level	Step 1	Step 2	Step 3	Step 4	Step 5
A	$2,424	$2,488	$2,549	$2,611	$2,672

THE SCHOOL DISTRICT OF
KANSAS CITY, MISSOURI

Human Resources Division

SECONDARY SCHOOL BUILDING MANAGER

MONTHLY (Calendar) SALARY SCHEDULE

261 DAYS PER YEAR

LEVEL	Step 1	Step 2	Step 3	Step 4	Step 5
A. Class #3 Building Mgr.	1,868	1,928	1,991	2,054	2,114
B. Class #2 Building Mgr.	1,991	2,054	2,114	2,177	2,240
C. Class #1 Building Mgr.	2,114	2,177	2,240	2,300	2,365

Class #3 Buildings	Bingham Middle, Central Middle, Lincoln Middle, Westport Middle, Nowlin Middle, S.E. Middle
Class #2 Buildings	East, Lincoln College Prep, N.E. Middle, Paseo, Southeast Sr., Van Horn, Westport, K.C. Middle, K.C. School of the Arts.
Class #1	Administration & Library Bldg (#1 Mgr), Custodian Trainer & Relief Building Mgr., Central, King-Weeks, Southwest, K.C. Tech, Northeast Sr.

ALL LEVELS EXEMPT FROM OVERTIME PAYMENT EXCEPT FOR "PERMIT" TIME & SPECIAL ASSIGNMENTS APPROVED BY THE DIRECTOR OF FACILITIES & TRANSPORTATION.

ATTACHMENT A-10

SECRETARIES PAY SCALES

STEP	CLERK	SEC. B	SEC. A	EXEC. SEC
C	1,016	1,109	1,203	1,296
D	1,062	1,157	1,248	1,340
E	1,109	1,203	1,296	1,386
F	1,157	1,248	1,340	1,433
G	1,203	1,296	1,386	1,480
H	1,248	1,340	1,433	1,526
I	1,296	1,386	1,480	1,572
J	1,340	1,433	1,526	1,619

ATTACHMENT A-11

THE SCHOOL DISTRICT OF KANSAS CITY, MISSOURI

Human Resources Division

SECURITY OFFICER

HOURLY SALARY

STEP 1	STEP 2	STEP 3	STEP 4*
$9.04	$9.37	$9.69	$10.01

NOT EXEMPT FROM OVERTIME

*Officer progression to step 4 is contingent upon the satisfactory completion of three years service plus 30 hours of advanced education, workshop or in-service, exclusive of annual orientation sessions, related to the job and approved in advance by the Director of Facilities and Transportation and by the Director of Human Resources.

ATTACHMENT A-12

NURSES SALARY SCHEDULE

CURRENT YEAR

REGISTERED NURSES

March 1, 1990 Active Data Base

STEP	ANNUAL	NO	COST
1	19,304	0	0
2	19,107	1	19,107
3	19,543	0	0
4	20,179	0	0
5	20,725	0	0
6	21,579	0	0
7	21,878	16	349,406

LICENSED PRACTICAL NURSES

STEP	ANNUAL	NO	COST	
1	12,739	0	0	169,933
2	12,869	2	25,736	85,189
3	13,135	1	13,295	
4	13,390	11	152,024	
	TOTALS	31	559,558	18.050

[Some numbers were almost illegible]

ATTACHMENT A-13

EXTRA PAY ASSIGNMENT SCHEDULE 1990-91

Middle Schools

Intramurals (As Certified)

53 Afternoons	1,000.00
35 Afternoons	750.00
18 Afternoons	500.00

Director - Band AND Orchestra	3,000.00 Year
Director - Band OR Orchestra	1,500.00 Year
Director - Varsity Mixed Choir	1,500.00 Year
Director - Intermediate Choir	1,250.00 Year

Visual/Performing Arts (Dramatics, Musicals, Dance, Creative and Technical) Coach. Each Production (Maximum 6 Per Year) 500.00

Extra Curricular or Magnet Club or Activity Sponsor

6-20 Students Participating	500.00 Year
21-50 Students Participating	750.00 Year
51 or More Students Participating	1,000.00 Year

Newspaper Sponsor	2,000.00 Year
Yearbook Sponsor	2,000.00 Year
Internal Finance - Accounting	1,000.00 Year

Audiovisual Coordinator

Less than 1,000 Enrollment	1,250.00 Year
1,001 to 1,500 Enrollment	1,500.00 Year
1,501 to 2,000 Enrollment	1,750.00 Year
2,001 Or More Enrollment	2,000.00 Year

All Teachers* *THE FOLLOWING IS SUBJECT TO FURTHER ANALYSIS AND DISCUSSION BETWEEN THE DISTRICT AND THE A.F.T.

Workshop -(Summer or Off Duty Hours)

Workshop Rates Subject to Funding Agency Limitations

Participant	Regular Hourly Rate of Pay
Instructor	Regular Hourly Rate of Pay
Supervisor	Regular Hourly Rate of Pay

Evening School

Instructor	Regular Hourly Rate of Pay
Supervisor	Regular Hourly Rate of Pay

Substituting

Extra Hour Assignment or Temporary Substituting .... Regular Hourly Rate of Pay

Elementary-Temporary Substituting ..... Regular Hourly Rate of Pay

These schedules apply to teachers only and are paid for tasks outside the scope of normal duties performed outside of regularly scheduled hours. Persons who complete an extra pay assignment shall receive full pay within forty-five (45) days of completion of extra pay activity.

(7)

Supreme Court, U.S.
FILED
NOV 8 1994
OFFICE OF THE CLERK

No. 93-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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(continued from front cover)

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APPENDIX 0

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed July 5, 1991]

Before the Court is the KCMSD's motion for approval of the desegregation plan for 1991-92. The KCMSD filed an amended motion and the State filed a response to the KCMSD's motion and amended motion. The KCMSD filed a reply to the State's response and filed a second motion for leave to amend its motion for approval of the desegregation plan for 1991-92. On June 10, 1991 the Court held a hearing on disputed issues for the 1991-92 desegregation plan. Parties filed post-hearing briefs on June 21, 1991.

The KCMSD moves this Court to enter an order approving its proposed desegregation plan for the 1991-92 school year. The KCMSD submits that it proposes only a modest one-year extension of its present desegregation programs with minimal necessary modifications. The proposal incorporates a number of adjustments some of which are based on enrollment driven formulas. In addition the KCMSD proposes two new initiatives and five magnet school program modifications based on the needs of magnet programs. The two new initiatives are a

proposal to improve security at secondary schools and to lengthen the school day at four magnet schools. The KCMSD proposes to continue the basic educational components of the remedy previously approved by the Court.

The State's position with regard to the proposed Year VII budget is that the Court should freeze all regular operating and desegregation programs at their current levels. The State also believes that no new programs should be approved for the KCMSD in light of the KCMSD's severe budget crisis. The State suggests that if some programs require more funding in Year VII, while other programs require less, the increased funding for those programs can come from budget transfers from those programs which have been reduced from Year VI. The State submitted specific objections to the KCMSD's proposed Year VII budget.

The KCMSD filed a reply to the State's response. The KCMSD noted that it considered "freezing" all programs at current levels when it developed the Year VII desegregation plan and budget. However, the KCMSD submits that the Court should not adopt the State's request for a freeze because it is not consistent with the purpose of the remedy. The KCMSD points out that the overall Year VII budget is an increase of approximately 3% over the 1990-91 approved budget.

The parties have agreed on the following components of the Year VII budget with the understandings stated. Components as to which there is no dispute are: reduced class size, full day kindergarten, extended day at traditional schools, summer school 1991, effective schools, base budgets, district communications, research and evaluation, interest expense, and the Westport computer technician.

Reduced Class Size

On July 25, 1988 this Court approved the class size reduction component for 1988-89 through 1990-91. The KCMSD has

reviewed planned enrollments for 1991-92 and has determined how many teachers it will need to meet the Court-ordered maximum class sizes. The budget reflecting these calculations was based on the assumption that base as well as them costs for the 1986-87 magnets will remain in the desegregation budget in 1990-91.

The State responds that if increase in the reduced class size budget is enrollment driven and provided that the KCMSD hired only the number of teachers that are needed to meet the court-ordered maximum class sizes, the State has no objection to the Court's continuation of this component. However, the State requests that the KCMSD file a report with the DMC by October 15, 1991 justifying the number of full-time equivalents funded under this component and listing actual enrollment in each school, teachers hired under this component and grade level for teachers hired.

The KCMSD responds that the type of detailed report requested by the State is best left to discussion among the parties and the DMC. The KCMSD believes it can work with the DMC and the parties to devise a report that will not be unduly burdensome and that can be delivered by a reasonably early date in the fall of 1991.

The KCMSD has presented a proposed method which it believes will more equitably allocate teacher costs between the operating and desegregation budgets. If such a method is approved, the budgetary estimate for reduced class size may have to be adjusted. The State reserves the right to contest such adjustments and the parties agree to brief this issue at the appropriate time.

1991-91 Budget	1991-92 Budget	KCMSD Obligation
$4,683,986	$5,627,985	$5,627,985

Summer School 1992

On July 25, 1988 this Court approved a summer school program for the summers of 1989-91. Last year the parties agreed to modify the 1991 summer school program. The KCMSD proposes to offer the same summer school program in 1992. The proposed budget does not include transportation. A request for transportation will be filed later on an actual cost basis.

The State responds that the KCMSD should provide an estimate of its transportation costs in order to enable to the State to comment on the proposed budget and asks that the Court require the KCMSD to present a complete budget to the Court.

The KCMSD states that it has no means of accurately discerning, until immediately before summer classes begin, the transportation related costs of the summer program. The KCMSD indicated that a very rough estimate of costs would be $610,281 — the amount budgeted in 1991 for transportation costs. Therefore, the State reserves the right to contest transportation costs.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$2,310,967	$1,744,296 (excluding transportation costs)	$436,075

Full Day Kindergarten

The KCMSD submits that full day kindergarten continues to be successful. The KCMSD requests a slightly increased level of funding based on increased enrollment for the 1991-92 school year.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$1,773,185	$1,837,094	$459,274

Extended Day at Traditional Schools

In 1988 this Court approved an extended day program in ten traditional elementary schools with a total budget of $600,000. This Court's July 5, 1989 Order approved an extended day program for six schools for 1989-90. The KCMSD proposes that extended day should be continued at the six schools.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$453,000	$453,000	$113,250

Effective Schools

In the July 5, 1988 Order the Court approved the funding requested by the KCMSD for the effective schools component for 1988-89 through 1990-91. The KCMSD proposes to continue the effective schools program under current DMC guidelines and procedures with the same level of funding per school. However, as a result of the anticipated change in the use of Southeast Annex, the budget requested is below that approved for 1990-91.

The State responds that there are no measures of reasonable progress in place which can evaluate the effectiveness of this program. Therefore, the KCMSD should be required to prove that increases in test scores are directly attributable to the effective schools funding. Dr. Marks requested one more year to show some kind of increase in test scores. Based on Dr. Marks' promise that test scores will go up or he will not request continuation of the program, the State does not object to this program being continued for one additional year. The State urges the Court to require the development of a definite set of standards by which the efficacy of effective schools funding will be measured over the next year.

The KCMSD states that instituting a more elaborate "evaluative criteria" process would take time and administrative re-

sources. The KCMSD believes it is more productive for this issue to proceed on an informal basis through the DMC rather than formalizing the process and creating new burdens for the program.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$7,350,000	$7,250,000	$1,812,500

Base Budgets

For 1990-91 the Court approved desegregation funding for the base costs of seven new magnet schools. The KCMSD proposes that base costs of these schools continue to be funded in this way.

The State does not object to this part of the Year VII desegregation plan as long as the FTE's hired are based on actual enrollments.

As with reduced class size, the KCMSD states that it is confident that working with the same parties and the DMC, it can devise a simple report that responds to the State's needs and deliver the report by an appropriate date in the fall.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$14,867,645	$13,308,424	$3,477,708

District Communications

In its July 25, 1988 Order the Court approved a three-year budget for the District Communications office. The KCMSD proposes to continue this program in Year VII.

The KCMSD resubmitted a proposal in which it agreed not to use desegregation funds to print an annual report. In addition the KCMSD agreed to freeze this budget at its 1990-91 level.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$31,125	$31,125	$7,781

Interest Expense

In its July 25, 1988 Order the Court found that the interest expense on the KCMSD's original bond issue for capital improvement costs was a desegregation expense. Therefore, the KCMSD has treated these expenses as part of its annual desegregation budgets and proposes to continue to do so in 1991-92.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$788,068	$593,503	$593,503

Research and Evaluation

In its July 25, 1988 order the Court approved the purchase of computer equipment for KCMSD research, evaluation and testing department. The Court also approved a repair and maintenance contract for such equipment in 1989-90 and 1990-91.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$5,414	$5,060	$1,265

Westport Computer Technician

1990-91 Budget	1991-92 Budget	KCMSD Obligation
	$65,113	$16,278

The total stipulated Year VII budget is $30,915,600. The KCMSD's obligation is $12,545,619.

The components of the Year VII budget which are disputed and which were the subject of the hearing are: early childhood education, 1986-87 magnets, security, lengthened school day, Central High School coaches, Montessori equipment, TTAP for paraprofessionals, resource teachers and home-school coordinator for J.A. Rogers, and reconsideration of computers for Richardson and Banneker schools. Components of the budget which were not discussed at the hearing but which are disputed

are: AAA Achievement, recruitment aide and five of six 1986-87 magnet schools.

Early Childhood Education Development Program

In its July 25, 1988 Order this Court approved the Early Childhood Education Development program requested by the KCMSD with several modifications. The KCMSD and State have jointly developed the Early Childhood program for 1991-92. However, the State has not agreed to an expansion of the program. The KCMSD proposes to offer the program to an additional 400 students next year. The KCMSD intends to locate the classrooms for this expansion at Pershing School. The program will provide screening for 4,464 children ages three to four; instructional services to 1,400 children in early learning center classrooms and parent education services to 5,000 families.

The State objects to the KCMSD's effort to add classrooms and teachers in light of the KCMSD's current budget crisis. Additional classrooms and teachers would add administrative expenses. In addition, the State points out that the budget request is only part of the funding requested by the KCMSD because staging costs have not been included. Staging costs would be approximately 1.1 million making the total increase 2.3 million and would bring the total cost of the early childhood program to approximately 5.9 million. The State asserts that the KCMSD should not attempt to provide expanded programs at this point.

The KCMSD replies that the increase requested is an enrollment driven expansion and is an ongoing obligation on the part of the State to remedy years of State-imposed segregation. The evidence presented at the hearing demonstrated that the Early Childhood program is valuable and successful in enhancing the achievement of developmentally delayed children. The State has also objected because of the cost of adding 20 teachers.

The KCMSD notes that to the extent the State objects to the costs of staging the expanded program at Pershing school, these matters will be fully argued through the briefing process on this matter and that particular issue is still before the DMC. The evidence at the hearing supported the need for an expansion in the Early Childhood program to accommodate the enrollment demand. Therefore the Court will approve the District's proposal to expand the Early Childhood program.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$3,598,491	$4,835,690	$1,208,923

Lincoln College Preparatory Teachers
(1986-87 Magnet Schools)

The KCMSD states the LCPA is a successful magnet school which includes an International Baccalaureate program. KCMSD presented evidence which shows that to maintain and improve Lincoln's success, five additional teachers are necessary to teach the academically rigorous courses and Advanced Placement courses. The DMC took no exception to this proposal "provided that meaningful increases in the admissions standards are instituted at Lincoln." Dr. Henley stated in her testimony that such an increase would be adopted for fall of 1992. The KCMSD submits that it currently does not have enough teachers to teach the intensive IB and AP classes, thus teachers must use a planning period to teach these classes. The KCMSD proposes the addition of two resource teachers to support the IB program. These teachers would provide academic guidance, counseling and mentoring to prepare students for the IB program and AP classes.

The State asserts that the mentoring teachers will serve to accommodate the increased admissions standards in serving students who are having academic difficulties. The State feels that the KCMSD should consider whether those students should

be demitted to enroll at other schools. Since Lincoln College Prep is designed to be a school for high achievers, there should not be a need for the proposed remedial help that the KCMSD is requesting. The State adds that the sole reason for adding teachers is to give currently employed teachers planning time, which the State considers to be an insufficient reason at this time of budget crisis.

The cost of adding five teachers is $233,017 and is included in the proposed budget for 1986-87 magnet schools.

Security

The KCMSD presented evidence that additional security is necessary to school safety and desegregative attractiveness. Captain Robert Livingston stated that there has been a 34% increase in personal security-related incidents and the KCMSD proposal is designed to address such incidents. The KCMSD proposes to add twenty-four site-based officers and four patrol officers. The proposed increase in school-based security officers would bring the average number of security officers up to four officers at the high school level and two officers at the middle school level. The goal is to deter personal security incidents by increasing security staff visibility and providing more comprehensive coverage of each school facility.

The KCMSD also proposes a pilot identification card system for Southeast High School which is designed to allow staff and administrators to quickly identify individuals involved in an incident to determine whether they belong in the facility. In addition, the KCMSD proposes hand-held metal detectors to provide for a quick and unintrusive weapon search which will deter students from carrying weapons into the school buildings.

The KCMSD has proposed a pilot closed-circuit TV system for Southwest High School. The CCTV system is designed to allow security personnel to more effectively monitor the build-

ing and promptly deploy personnel to potential security incidents as they develop The KCMSD anticipates that these pilot programs will be more cost-effective than adding additional security guards beyond those currently proposed by the KCMSD.

The State asserts that there was no showing that the KCMSD's security proposal is directed at any particular security problem which is related to prior segregation. The State emphasizes that the security measures proposed by the KCMSD are not vandal-proof and Mr. Livingston, witness for the KCMSD, admitted that the KCMSD had not considered whether it could possibly close certain entrances and exits to alleviate the need for additional security. Nor has the KCMSD pursued any arrangement with the Kansas City, Missouri Police Department to provide for further security needs. The State submits that, in this time of budgeting crisis, expanded and expensive pilot security programs which are of speculative value, should not be approved.

The Court will approve the District's security proposal. However, the Court notes that the obligation to provide security is the primary responsibility of the Kansas City, Missouri Police Department and the District is encouraged to request the Police Department to fulfill its obligation.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
N/A	$1,003,345	$250,836

Lengthened School Day at East, Southeast, Central and Northeast Middle Schools

The KCMSD proposes to lengthen the school day at four magnet schools to make the themes more educationally effective and desegregatively attractive. The KCMSD presented evidence that it was difficult to fit the required state, magnet theme and general elective curriculum classes into the standard seven-day period. In addition, lengthening the school day will allow

students to take traditional secondary electives such as advanced courses in music, typing and ROTC.

The State objects to lengthening the school day because of additional administrative costs and lack of a demonstrable interest in the proposal. This proposal would add 24 new teachers to the KCMSD for which the KCMSD has no plan to pay its share of the additional cost of this proposal. Furthermore, the State asserts that with more careful scheduling, students could take all of the courses needed to complete a program in a seven period day. The State argues that no showing was made that this expensive adjustment is necessary.

The Court will approve the District's request to lengthen the school day at East, Southeast, Central and Northeast Middle schools.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
N/A	$929,728	$2 32.432

Central High School Coaches

The KCMSD requests Court approval for additional coaches at Central High School, beyond those funded through the operating budget at other schools. The KCMSD states that it will not ordinarily employ a coach for a team sport based upon the request of a single or a few students; however, for those sports which require only a single participant, the KCMSD will critically evaluate the need for providing that student with a coach. The KCMSD specifically requests an off-season track and field coach.

The State asserts that there are substantial numbers of personnel already directed at teaching athletics at Central High School and they should be sufficient to provide any coaching that is needed. The State adds that it seems particularly inappropriate for the KCMSD to assert a demand for additional coaches unless

there is a substantial demand demonstrated by the KCMSD from a significant number of students who are interested in a particular activity.

The Court will deny the District's proposal for Central High School Coaches. However, the District may submit separate motions to the Court, upon a showing of need and demand, requesting coaches for specific sports.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
N/A	$213,105	$53,276

Montessori Equipment

The KCMSD presented evidence that it is necessary to teach six new classes that will be opening at Faxon and Harold Holliday Montessori magnets this fall. The KCMSD considers the Faxon and Holliday magnets to be immensely successful magnet programs that consistently meet the desegregation goals of the LRMP. Both schools are meeting the requirements for certification by the Association Montessori Internationale, the only internationally recognized American certification.

Montessori schools rely on special equipment instead of traditional textbooks. The equipment requested is necessary to implement the magnet theme in the six additional classrooms that open next year. All of the equipment requested is also required to meet the AMI accreditation standard. AMI certification is helpful in attracting children from private schools.

The Court will approve the District's proposal for Montessori equipment.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
N/A	$150,000	$37,500

Tuition Assistance for Paraprofessionals (TAP)

The KCMSD and AFT submitted evidence that the TAP program will help certify 30 qualified paraprofessionals, with a demonstrated commitment to the KCMSD, to teach in the District in accordance with the goals of the LRMP. The KCMSD and AFT suggest that there are qualified full-time paraprofessionals in the District who could become certified full-time teachers. Without tuition assistance, these individuals would find it difficult, if not impossible, to obtain a Missouri teaching certificate. The KCMSD states that enabling these individuals to become certified to teach will reduce the turnover rate within the District.

The State responds that the KCMSD proposes a cost of $63,000 for this program and that in addition to adding costs for which the KCMSD has no funds available, this new program proposal does not appear to lead to obtaining high quality teachers that the Court's salary increase of July 23, 1990 was directed to accomplish. The State objects to the low grade point average required for the TTAP. While the State acknowledges that this proposal could be worthwhile in a district with funds to spare, it is not a program which is necessary. Clearly, the State submits, if this were an operating budget program, it would be a candidate for budget cutting.

The Court will deny the District's request for Tuition Assistance for Paraprofessionals based on the reasons set forth by the State.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
N/A	$63,000	$15,750

J.A. Rogers Academy of Liberal Arts & Sciences

The KCMSD states that in order to support the liberal arts and sciences middle school magnet theme at J.A. Rogers Academy,

it has proposed the addition of two resource teachers to teach Philosophy and Geography. These two positions were identified in the planning process by the school's task force as necessary to fully implement the magnet theme. The KCMSD also proposes the continuation of the home school coordinator to provide academic support to students. The KCMSD states that the coordinator is important to provide students with extra academic support. The coordinator also serves as a liaison between students' families and the school to ensure that their personal, social and monetary needs are not interfering with the academic rigors of the program.

The State asserts that regular teachers could perform all of the functions of the proposed resource teachers, especially in helping students with their thesis. Regarding the home school coordinator, the State emphasizes that this position is designed for a social worker, not an academic teacher. The State maintains that the KCMSD should be cutting nonacademic personnel, rather than seeking to increase them.

The Court will approve the District's request for two resource teachers and continuation of the home-school coordinator.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
Teachers:		
N/A	$97,737	$24,434
Home-School Coordinator:		
$18,150	$18,150	$4,538

Banneker and Richardson Computer Equipment

The KCMSD submits that plaintiff's request for computer equipment at Banneker and Richardson computer magnet elementary schools is critical to implementation of the computer theme and to maintaining the desegregative attractiveness of these programs. Thus, the KCMSD supports plaintiff's motion

to alter or amend this Court's order of May 30, 1991 denying plaintiff's request for additional equipment. The KCMSD agrees with plaintiffs that the request is necessary to equip six additional classrooms. Also plaintiff's proposal for repair and maintenance funds are claimed to be critical to successful implementation of the magnet theme at Richardson. Plaintiffs request additional computers in the same amounts and configurations as the State agreed to last year.

The State notes that this proposal would cost $648,000 and maintains that there was no showing that additional computer equipment is absolutely necessary.

This request is before the Court on a motion to reconsider. The Court will reconsider its order and approve the software requests at Banneker and the repair and maintenance and software requests at Richardson.

Banneker Software	Total
$160,120	$290,120

Richardson Repair and Maintenance and Software

$130,000

1986-87 Magnets

The KCMSD indicates that the State has persisted in its argument that the base costs of Lincoln, Swinney, Volker, Cook, Marlborough and Hartman should be carried by the KCMSD operating budget and not the desegregation budget. The KCMSD submits that the Deloitte & Touche report did not conclude that the KCMSD operating budget has millions of dollars available to fund base costs of the 1986-87 magnets. As in Year VI, the KCMSD asserts that the full costs of these magnet schools should be approved as desegregation costs in Year VII with base costs to be a 100% KCMSD obligation and the theme and other

desegregation costs allocated 75% to the State and 25% to the KCMSD, with joint and several liability.

The State objects to permitting the KCMSD to continue to show the base costs of these schools as a desegregation obligation.

The KCMSD admits that this Court's order of October 18, 1989, November 2, 1989 and January 23, 1990 indicated that the base cost of these schools should be borne by the operating budget. However those orders were all stayed by the Court on February 1, 1990 pending a study of the KCMSD operating budget. The study did not indicate that the KCMSD has resources available from its operating budget to support the base budgets. The KCMSD suggests that the Court leave the stay in place and permit the costs to be carried in the desegregation budget, at least pending resolution of the operating budget funding issue.

The Court will approve the District's proposal for the 1986-87 magnets.

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$15,694,833	$14,920,610	$9,443,399

AAA Achievement

On July 25, 1988 this Court approved the AAA component requested by the KCMSD for 1988-89 through 1990-91 in order for the KCMSD to be able to provide sufficient library, counseling, art, music and physical education services to attain a AAA rating. For 1991-92 the KCMSD has calculated its AAA requirements according to the same formula used in the past.

The State asserts that the KCMSD ought to bear the full cost of maintenance of AAA status as an operating expense. The State maintains that it has fulfilled its initial obligations to fund the attainment of AAA status and has funded maintenance as

well. This, the State believes that it is appropriate to shift fiscal responsibility for maintenance of AAA back to the KCMSD entirely as an operating expense. Alternatively the State suggests that this Court shift the allocation to the KCMSD as a 100% desegregation liability. The State particularly objects to the KCMSD using desegregation funds to maintain certain libraries in excess of AAA standards. The State submits that in no event should it be required to pay more than $1,479,100 which is the appropriate cost for library maintenance.

In its reply the KCMSD notes that this Court has previously rejected the KCMSD's argument. The KCMSD also disagrees with the State's position that the AAA budget devoted to library resources is too high because this Court has previously approved AAA budgets built exactly the same way.

The State notes that the KCMSD stipulated that the count of some materials in its libraries is in excess of the minimum requirements for AAA, due partly to the use of AAA maintenance funds. The State's position is that AAA maintenance funds should not be used to exceed the minimum requirements for AAA libraries. AAA maintenance funds should not be used to allow the KCMSD to exceed the AAA library standards. Thus, the State argues that there is no basis to require more than the cost of reaching the minimum requirements for AAA libraries with any desegregation funds.

The Court agrees that the State should not be required to assist the District in exceeding AAA requirements for libraries. Therefore, the Court will approve $1,479,100 for library resources. The proposed budget for 1991-92 is as follows:

Schools:

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$4,611,139	$4,613,310	$1,153,328

Library Resources:

1990-91 Budget	1991-92 Budget	KCMSD Obligation
$1,958,250	$2,007,794	$2,007,794

Total proposed:

$6,569,389	$6,621,104	$3,161,122

The Total approved for AAA status is $6,092,410 and the KCMSD's obligation is $2,629,428.

Recruitment Aide

Plaintiffs have requested a magnet recruiting aide, a proposal which the KCMSD supports. This position would relieve recruiters of clerical tasks which would enable them to spend more time in direct contact with potential applicants and their parents. The KCMSD asserts that magnet school recruiting is one of the most critical functions if the KCMSD is to be desegregated. The State asserts that this is yet one more administrative position for which the KCMSD will not be able to pay its share of the cost.

Plaintiff's motion to reconsider plaintiffs' request for a recruitment aide will be denied.

In addition, the Court will add to the Year VII desegregation budget the seventeen resource teachers who the Court finds are academic personnel and who were cut as a result of the new administration's reorganization plan for the operating budget. The cost for the resource teachers is $763,657.

The total Year VII budget on disputed issues is $29,101,447. The total Year VII KCMSD obligation is $14,094,934. The total Year VII budget is $60,017,047. The KCMSD obligation is $26,640,553. The State's obligation is $33,376,494.

Accordingly it is hereby

ORDERED that this Court approves the stipulated Year VII budget items; and it is further

ORDERED that the KCMSD's proposal for the Early Childhood Education Development Program is granted; and it is further

ORDERED that the KCMSD's proposal to add five teachers at the Lincoln College Preparatory Academy is granted; and it is further

ORDERED that the KCMSD's security proposal is granted; and it is further

ORDERED that the KCMSD's lengthened school day proposal at East, Southeast, Central and Northeast Middle schools is granted; and it is further

ORDERED that the KCMSD's Central High School coaches proposal is denied; and it is further

ORDERED that the KCMSD's Montessori equipment proposal is granted; and it is further

ORDERED that the KCMSD's Tuition Assistance for Paraprofessionals proposal is denied; and it is further

ORDERED that the KCMSD's J.A. Rogers Academy of Liberal Arts and Sciences proposal to add two teachers and continue the home school coordinator is granted; and it is further

ORDERED that plaintiff's request for reconsideration of the Banneker and Richardson computer equipment proposal is granted as to software and repair and maintenance; and it is further

ORDERED that the KCMSD's Proposal for 1986-87 magnets is granted; and it is further

ORDERED that the KCMSD's Proposal for AAA Achievement is granted with the exception that the State is not required to assist the KCMSD in exceeding AAA requirements for libraries; and it is further

ORDERED that plaintiff's request for reconsideration of the Recruitment Aide is denied; and it is further

ORDERED that the seventeen resource teachers who were cut from the operating budget as a result of administrative reorganization are added to the Year VII desegregation budget.

/s/ Russell G. Clark
RUSSELL G. CLARK, JUDGE
UNITED STATES
DISTRICT COURT

Date: July 05, 1991

APPENDIX P

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

JOINT STIPULATION OF ALL PARTIES CONCERNING KCMSD'S 1992-93 DESEGREGATION PLAN

All parties to this case — plaintiffs, the State of Missouri Defendants ("State"), Kansas City, Missouri School District ("KCMSD"), and the AFT Local Union 691 ("AFT") — hereby submit this Joint Stipulation regarding the KCMSD's Motion for Approval of Desegregation Plan for 1992-93 (filled March 25, 1992). These stipulations reflect the parties' attempt to narrow the factual issues in dispute at the hearing scheduled for May 27, 1992 and reflect the agreement of all the parties.

The State reserves its legal objections, based primarily on the Supreme Court's recent decision in the case of *Freeman v. Pitts*, 60 U.S.L.W. 4286 (March 31, 1992) as fully set forth in State's Response to KCMSD Motion for Approval of Desegregation Plan for 1992-93 (filed April 20, 1992).[1]

[1] AFT Local 691 supports KCMSD's Year VIII proposals, but with the following qualification; the AFT expressly reserves its arguments that the Court should provide no funding for any new desegregation programs or projects, nor any increased funding for existing desegregation programs or

(Footnote 1 continued on next page)

Nevertheless, these stipulations reflect the agreement of all the parties: 1) that with respect to a number of components, there is no other dispute between the parties and if the court rejects the State's argument based on *Freeman v. Pitts*, the parties agree to the budget and scope of the program as proposed;[2] 2) that with respect to one component, no factual issues exist and the legal issues in dispute will be submitted on the briefs; and 3) that certain components will be the subject of a hearing.

1. *Components as to which There is No Factual Dispute Concerning the Proposed Budget.*

The parties stipulate their agreement that with respect to the following components there is no factual dispute as to the budget and the scope of the program proposed, other than that outlined in the State's Response:

* AAA
* Reduced Class Size
* Early Childhood
* Full Day Kindergarten
* Base Budgets
* Interest Expense
* Summer School
* Maintenance

(Footnote 1 continued)

projects unless and until desegregation funding is provided to raise the salaries of KCMSD's teachers and other employees to adequate, competitive levels and that providing salary levels adequate to attract and retain the quality of personnel necessary to implement the existing desegregation programs should be a higher priority than any other new initiatives.

[2]The State, of course, reserves its right to appeal an adverse decision on its *Freeman v. Pitts* argument or any of the factual issues that are the subject of the hearing.

If these components are approved, the budgets for them will be as follows, with joint and several liability:[3]

	1992-93	KCMSD Obligation
AAA	$ 6,675,244	$ 2,846,175
Reduced Class Size	$18,975,675	$18,975,675
Early Childhood	$ 5,435,513	$ 1,170,333
Full Day Kindergarten	$ 2,087,727	$ 521,932
Base Budgets	$ 3,803,432	$ 950,858
Interest Expense	$ 593,503	$ 593,503
Summer School	$ 2,476,844	$ 619,212
Maintenance	$ 4,602,048	$ 4,602,048

2. *Additional Legal Issues Reserved by the Parties.*

The parties stipulate their agreement that the following component will not be the subject of an evidentiary hearing:

1986-87 Magnets - The parties agree to submit their dispute as to the base costs for the 1986-87 Magnets on the briefs.

3. *Components as to which There are Factual Disputes.*

The parties agree that at this point there remain factual disputes among them with respect to the following components that may properly be the subject of an evidentiary hearing:

[3]The stipulation of the parties with respect to Summer School and Early childhood is conditioned upon the KCMSD'S withdrawal of its request for multi-media equipment dedicated to the Summer School program and certain components of the Early Childhood program objected to by the State. The budgets in the chart above for these two components have been reduced accordingly and replace those originally requested by KCMSD.

* Extended Day
* Effective Schools
* Security
* High School Prep.
* District Communications
* Special Education Compliance

Additionally, factual disputes concerning the *Freeman v. Pitts* issues relating to the components addressed in Section 1 of this stipulation may arise and properly be the subject of testimony at the hearing.

All the parties stipulate and agree that this Joint Stipulation is intended to resolve potential factual disputes about certain components, with the purpose of narrowing the issues requiring a hearing. This Joint Stipulation is not an admission that the components as originally presented were in any way deficient or an admission that further arguments could not be adduced to oppose certain components on which the parties have agreed not to raise certain factual disputes. All parties agree that post-hearing briefs shall be submitted no later than June 5, 1992.

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APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

KCMSD'S REPLY TO STATE'S RESPONSE TO KCMSD'S MOTION FOR APPROVAL OF DESEGREGATION PLAN FOR 1992-93

The State groundlessly opposes the entirety of the Kansas City, Missouri School District's ("KCMSD" or the "District") Desegregation Plan for 1992-93 based on its myopic view of the Supreme Court's recent decision in *Freeman v. Pitts*, 60 U.S.L.W. 4286 (March 31, 1992). The State's narrow focus misses the most fundamental tenents of school desegregation law recently reaffirmed by the Supreme Court both in *Freeman* a month ago and in *Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. __, 111 S. Ct. 630 (1991), only last term.

In both cases, the Supreme Court resoundingly reaffirmed its longstanding holding that defendants in school desegregation cases have an affirmative duty to eliminate all the vestiges of segregation to the extent practicable.[1] The State cannot bring

[1] *See Freeman*, 60 U.S.L.W. at 4291 ("duty . . . to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system"), 4292 ("end purpose must be to remedy the violation"), 4293 ("District Court should address whether the vestiges of past discrimination have been eliminated to the extent practicable"), and 4294 ("curing the effects of specific violation"); *Dowell*, 111 S.Ct. at 638 ("whether the vestiges of past discrimination have been eliminated to the extent practicable").

itself even to allege that the "system wide *reduction* in student achievement" caused by State-mandated segregation in the KCMSD has been eliminated, *Jenkins v. Missouri*, 639 F. Supp. 19, 24 (W.D. Mo. 1985) (emphasis in original), *aff'd as modified*, 807 F.2d 657 (8th Cir.) (*en banc*), *cert. denied*, 484 U.S. 816 (1987), or that KCMSD's student enrollment is desegregated. *See, e.g., id.* at 27 29, 31 and 35 (various remedial components ordered will help in "attracting and maintaining non-minority student enrollment"). Because it has not alleged, and certainly cannot prove, that the vestiges of segregation in the areas of educational quality and student enrollment have been eliminated, its argument that the *Milliken II* components of this Court's remedy should be discontinued or phased out is meritless.

The objections to particular components raised in Section II of the State's Response are similarly groundless. The State's factual arguments are based almost entirely on misinterpretations of KCMSD evaluation data and misreadings of the Year VIII proposal. Moreover, they conflict with the essential thrust of the State's argument in Section I in significant respects and thereby demonstrate that the State's primary goal is to avoid its obligations as a constitutional violator.

I. The Supreme Court's Decisions in *Freeman v. Pitts* Provides No Basis for Discontinuing Integral Aspects of the Ongoing Remedy in this Case.

A. The State Cannot Meet its Burden of Proving, Nor Does it Even Allege, that the Vestiges of Segregation In the Areas of Educational Quality And Student Enrollment Have Been Eliminated as Far as Practicable in KCMSD.

The State's misplaced reliance on *Freeman v. Pitts* rests on several obvious misreadings of the Supreme Court's decision. The most blatant of these is the State's failure to recognize that elimination of the vestiges of segregation to the extent practi-

cable is the essential prerequisite to a declaration of unitary status with respect to *any* area of a school desegregation remedy. The State erroneously takes the Supreme Court's language in *Freeman* out of context to make its claim that "the ultimate object" of a desegregation case is "to return school districts to the control of local authorities." State's Response at 9. The State, however, ignores the first statement in that same paragraph that "*the Court's end purpose must be to remedy the violation. . . .*" 60 U.S.L.W. at 4292 (emphasis added).[2]

The Supreme Court, however, strongly reaffirmed in *Freeman* the duty and responsibility of defendants liable for intentional segregation "to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." 60 U.S.L.W., at 4291.[3] Reiterating the principles articulated in *Dowell*, the Court stated:

[2] The State's reading of *Freeman* also ignores the Supreme Court's reaffirmation of the importance of addressing educational quality issues in school desegregation remedies. The Supreme Court in *Freeman* ruled that, when a federal court considers whether to relinquish supervision over part of a school district's operation, "quality of education [is] a legitimate inquiry in determining [a school district's] compliance with the desegregation decree." 60 U.S.L.W. at 4293. The appropriateness of such educational relief has been clear since the Court's 1977 decision in *Milliken II* finding that in addition to correcting the racial isolation that results from prior segregation, defendants who are liable must correct "educational deficits" as well. *Milliken v. Bradley*, 433 U.S. 267 (1977) (*"Milliken II"*).

[3] The Court in *Freeman* authorized district courts to exercise their discretion to withdraw supervision from general areas of school district operations only where: (1) the vestiges of segregation in that area have been eliminated as far as practicable; (2) the defendants have completely and satisfactorily complied with the court's orders in that area; (3) continued judicial control in that area is not necessary to achieve compliance in other areas of school district operations; and (4) the defendants have demonstrated a good faith commitment to the court's decree and to their duties under the U.S. Constitution.

> The District Court should address itself to whether the Board ha[s] complied in good faith with the decree since it was entered, *and whether the vestiges of segregation have been eliminated to the extent practicable.*

Freeman, 60 U.S.L.W. at 4293 (quoting *Dowell*, 111 S. Ct. at 638) (emphasis added). Of course, the *Dowell* formulation simply restated the Supreme Court's repeated holdings over the years that *effectiveness* in eliminating vestiges of discrimination is the standard to be employed when assessing whether a school district, or aspects of its operations, should be declared unitary. *See Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Keyes v. School District No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).

The State thus ignores decades of consistent jurisprudence and asks this Court to relinquish its jurisdiction over thirteen of the fifteen remedial components contained in the District's Year VIII Desegregation Plan[4] without even *alleging*, let alone proving, that the vestiges of segregation found by this Court have been eliminated. As the *Freeman* Court stated, a defendant in a school desegregation case who seeks to end district court supervision, and thereby its own remedial obligations, "bears the burden of showing that any current [racial] imbalance [or other persistent effect of segregation] is not traceable, in a proximate way, to the prior violation." 60 U.S.L.W. at 4294. Accordingly, in order to support eliminating these components under *Freeman*, the State must prove that the deficits in educational outcomes due to segregation have been eliminated in the KCMSD, or that any remaining deficits are not traceable to the prior violation. Moreover, the State must show that KCMSD has achieved a desegregated student enrollment to the extent practi-

[4] The two remaining components, Interest Expense and High School Prep, the latter of which the State opposes on other grounds, constitute less than two percent of the District's proposed Year VIII budget.

cable. The State says nothing about what its proof will show on these issues. In fact, the evidence will show that the damage to educational achievement in the KCMSD that was caused by segregated schools persists, and that the programs ordered to date by the Court have begun to address the problem but have not yet fully succeeded. The evidence also will show that, while progress has been made in attracting a desegregated enrollment, particularly in magnet schools, more progress is necessary and achievable.

The State has not moved for unitary status on any component of the remedy or indicated that it can carry its burden of showing that unitariness has been achieved.[5] Instead, the State apparently is content to contend that merely because versions of these programs were implemented last year, the year before or for several years, they should be eliminated.[6] State's Response at 10. But the Supreme Court held early on in *Raney v. Board of Education*, 391 U.S. 553 (1968), and recently reaffirmed in both *Dowell* and *Freeman*, that a release of jurisdiction upon a

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[5] The Supreme Court in *Freeman* and *Dowell* plainly envisions a process in which defendants seeking a declaration of unitary status with respect to any general aspect of a school district's operations file a motion to this effect and bear the burden of proving that the vestiges of segregation have been eliminated to the extent practicable, that the defendants have complied with the court's orders and have demonstrated a good faith commitment to desegregation and that the criteria for incremental withdrawal of court supervision have been met. *See supra*, note 3.

[6] The State's occasional reference to the District's ostensible ability to choose which programs to implement if desegregation funding is eliminated is disingenuous. *See, e.g.*, State's Response at 10. The State is quite aware of the District's current financial position, and knows full well that the ruling it proposes — completely eliminating almost $60,000,000 in programs that form the bedrock for educational improvement and desegregation in the KCMSD — would decimate both the remedy in this case and the quality of education in the KCMSD. By contrast, the District proposes to continue these important remedial programs but to trim their budgets where practicable, resulting in a significant net decrease from the court-ordered Year VII budget.

showing merely that a school district adopted a remedial plan would "be inconsistent with the responsibility imposed on the District Courts by *Brown II*." *Raney*, 391 U.S. at 449 (citation omitted).

The fallacy of the State's legal argument is underscored by reference to the specific components at issue:

- The State essentially argues that because the District has achieved a AAA rating this year, funding for this component should be withdrawn next year. The State implicitly suggests that providing Art, Music, P.E., Library and Counseling services to its students is no longer important to improving their academic achievement or to attracting suburban and private school non-minority parents and students to the District.

- According to the State, because KCMSD has achieved and maintained acceptable class sizes since 1988-89, it now should fire hundred of teachers funded by the Reduction in Class Size component regardless of the educational needs of the plaintiff schoolchildren or the importance of reasonable class sizes to potential non-minority students and their parents.

- The State claims that a Full-Day Kindergarten program is not appropriate next year because the District offered it this year, wholly ignoring the educational deficits the program was designed to remedy.

- Likewise, the State ignores the continuing remedial purposes of the Extended Day, Summer School and Early Childhood Education programs.

- The State responds to the District's responsible proposal to reduce desegregation funding for the 1986-87 Magnets with a suggestion that they be eliminated altogether, despite their important contribution to de-

segregating the District's student enrollment and remedying educational deficits.

- The State explicitly admits that the Effective Schools program has not yet met its "desegregative goals" but claims that *Freeman* counsels its elimination regardless of the consequences to the eventual achievement of those goals or to education in the District.
- The State's proposal for Base Budgets would mean that new magnet schools, once implemented, would have to turn off the lights and the heat in the buildings and close down.
- Similarly, the State makes no argument that communicating with District patrons, providing secure school environments, maintaining facilities and affording equal educational opportunity to children with special needs are no longer important to the task of successfully remedying its constitutional violation in KCMSD, but instead argues that because the District does these things now, the support required to do them next year should be withdrawn and the Security, Maintenance and Special Education Compliance programs terminated.

These arguments are as troubling in fact as they are erroneous as a matter of law.

The State's failure to allege that the vestiges of segregation have been eliminated to the extent practicable is fatal to its entire misguided *Freeman* argument. The State cannot meet its burden and, therefore, does not even try. As a result, the arguments raised in Section I of its brief in support of its proposal to eviscerate the *Milliken II* plan in this case should be rejected summarily.

B. *Freeman* Does Not Suggest that Particular Programs Should Be Terminated As Soon As They Are Implemented.

The State errs in attempting to stretch the Supreme Court's holding in *Freeman* — that it is permissible for a district court to release a school district from supervision in certain broad areas of its school operations where the vestiges of segregation in those areas have been eliminated — to argue that a trial court may eliminate particular educational programs as soon as they are implemented. The Court's opinion in *Freeman*, however, suggests only that it may be appropriate for a district court in its discretion to release defendants from its jurisdiction in *general* areas of school operations, such as the six *Green* factors[7] (physical facilities, transportation, student assignments, faculty, staff, and extracurricular activities) or in the area of educational quality.

The State's argument that particular programs or schools, as opposed to general areas of school district operation, can be declared unitary incrementally not only misinterprets *Freeman*, but would lead to absurd results; if particular programs or schools were eliminated from the remedy upon implementation, no desegregation remedy could succeed. Pushed to its logical limits, the State's argument means that once a particular school or classroom implemented desegregation programs, it could be released from court jurisdiction. *Freeman* is quite clearly contrary to the State's extreme assertion.

There also is nothing in *Freeman* that would allow an individual school to be declared unitary, even where it has been

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[7]The Court in *Freeman* referred to these six areas of school operations, first articulated in *Green v. New Kent County School Board*, 377 U.S. 218 (1968), that a district court should evaluate to determine whether all the effects of prior discrimination have been eliminated and a school district therefore properly can be declared unitary.

successfully desegregated. The Court in *Freeman* directed district courts to examine success in desegregation with respect to the *Green* factors and the overall quality of education in the school system. These areas are far broader than an isolated examination of an individual school or program. Accordingly, the State's effort to terminate individual schools or programs because they supposedly are "implemented" in some sense must fail.

C. Under *Freeman*, Judicial Supervision Even of A General Area of School Operation Cannot Be Lifted If It Negatively Impacts Other Areas of the School System.

The State's suggestion that *Freeman* provides a basis for this Court to abandon particular programs as soon as they are implemented is also incorrect because it ignores the Supreme Court's insistence that district courts consider whether it is necessary or practicable to retain control of certain areas of school district operations where the vestiges of segregation have been eliminated, in order to ensure compliance in another area. 60 U.S.L.W. at 4293. It simply makes no sense to consider eliminating the educational components of the *Milliken II* relief ordered in this case where the vestiges of segregation remain, especially in the area of educational quality. The *Milliken II* programs form the essential foundation of the entire remedy. For example, the efficacy of the Long Range Magnet Plan would be undermined drastically if KCMSD class sizes increased substantially or the District lost AAA status as the State proposes. Thus, even if the vestiges of segregation in the area of educational quality had been eliminated — which they have not been and the State does not claim otherwise — *Freeman* does not provide a basis for abandoning the *Milliken II* programs because of their integral importance to desegregation in the related area of student assignments. *See, e.g.*, 639 F. Supp at 27, 29 , 31 and 35 (importance of remedial education components "to attracting [illegible] maintaining, non-minority student enrollment").

The State apparently fails to see the distinction between a school district which has been operating under continuing judicial oversight for twenty-three years (as the DeKalb County, Georgia School System had been in *Freeman*) and KCMSD, which is early in the process of implementing fully a desegregation remedy that has been ordered incrementally over a period of only seven years.

The State, however, does concede that the components of the Year VIII plan "have all been fully implemented," and it congratulates the District for the first time on its "consistent pattern of lawful conduct directed to eliminating earlier violations." State's Response at 11, 17. Considering the source of this commendation, it is a remarkable tribute to KCMSD and Superintendent Walter Marks. Only a year ago the State was accusing the District of "repetitious failures" in implementation, *see* Letter from Bart A. Matanic to Allen R. Snyder and Kevin J. Lanigan at 3 (March 28, 1991) (State's response to informal discovery requests), and arguing that the District's implementation of the remedy was so poor that KCMSD should be placed in receivership. *See* State's Response to KCMSD's Motion to Expedite Ruling, Initial Responses to its Motion for Funding Relief and Memorandum in Support of State's Motion to Require KCMSD to Show Cause Why It Should Not Be Placed in Receivership and for Further Relief (filed February 14, 1992) ("Receivership Motion").

Indeed, last year the State claimed the KCMSD's "failure of implementation" unduly prolongs the remedy, *see* Receivership Motion at 11, 13, but this year the State claims it is KCMSD's "full implementation" that somehow unfairly extends the State's remedial obligations. State's Response at 10. Both of these inconsistent claims are wrong; KCMSD's and the State's remedial obligations continue until their constitutional violation has been cured. The State simply fails to recognize this legal duty and factual imperative and thus fails to see the basic legal

principles and procedures reaffirmed and clarified by the supreme Court in *Freeman*; instead, the State grasps at any argument it can in another attempt to escape or minimize its remedial responsibilities regardless of the continuing vestiges of the constitutional violation in the KCMSD.

II. The State's Other Objections to Particular Components are Meritless.

Despite the State's candid admission that the District is doing a good job of implementing this Court's remedy and the Joint Stipulation agreed upon by the parties after extensive negotiations to narrow the factual issues in dispute,[8] the State nevertheless raises numerous factual objections to components of the District's Year VIII Plan. Because these are meritless, they all should be rejected.

For example, the State's repeated allegations that KCMSD has not evaluated the remedial components proposed, *see* State's Response at 1 and 20, and that the District seeks to expand them, *id.* at 10, are both demonstrably false. The KCMSD has done formal written evaluations on all of the desegregation educational programs that are susceptible to that type of analysis and has informally evaluated the other components, as the State is already aware. *See* Attachment 2 to State's Response 1-2 (Letter from Ruth Alderson to Diane Vaughn (March 30, 1992)). As a result of these evaluations, virtually every component has been modified in some respect. Overall, these modifications lead to a reduction of more than $800,000 in the proposed Year VIII budget compared to the court-approved Budget for Year VII.

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[8]The parties have agreed in the Joint Stipulation (filed May 11, 1992), to compromise on the factual objections raised by the State to the District's Summer School program and Early Childhood Education program. Therefore, this reply brief does not address the factual issues with respect to those components, which now have been resolved.

See Memorandum in Support of KCMSD Motion for Approval at 3, 28.[9]

The State's factual objections to particular programs also are meritless, reflect a poor understanding of the District's proposals, and are inconsistent with the State's arguments that the programs should be discontinued based on *Freeman*.

1. *Extended Day.*

The State argues in Section II of its brief that the Extended Day Program should be discontinued because it is not attracting non-minority students to the District. Thus, the State inconsistently argues in Section I of its brief that the program should be ended because it is successful and in Section II that it should be disgarded because it is unsuccessful.

The State's argument that the Extended Day Program is unsuccessful is plainly incorrect. The State quotes language from the Extended Day Program Evaluation out of context to argue that it is not desegregatively attractive. The Evaluation Report clearly indicates, however, that the Extended Day program *alone* cannot reasonably be expected to draw significant numbers of non-minority students to desegregate a racially isolated traditional school, although the report and other evidence at the hearing will show that it is *one* factor that is attractive to non-minority parents and students.

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[9]The amount of the reduction proposed by KCMSD has increased since the filing of its original Motion because of voluntary reductions in the proposed Early Childhood and Summer School budgets pursuant to the Joint Stipulation. The reduced budgets are shown in the Joint Stipulation attached as Exhibit A to this brief. The District intends to continue its efforts to reach agreement with the parties on other disputed components. The District also has been examining the issue of whether the cuts to the operating budget that it has recently made for 1992-93 suggest desegregation budget cuts. The District will be discussing this issue with the parties and hope to have it resolved before the Year VIII hearing.

More importantly, the purpose of the Extended Day Program at traditional schools was not solely to attract non-minority students but also to provide educational benefits. *See, e.g.*, 639 F. Supp at 32 ("to improve academic achievement"); July 5, 1989 Order at 5-6 (achievement data showed "success of the program as required by this Court's order of July 25, 1988"). As the evidence at the hearing will show, the same evaluation report cited by the State indicates that the program has had a substantial positive impact on the academic achievement of those students that participate in it. Thus, there is absolutely no evidence to support either of the State's inconsistent arguments that this program should be discontinued.

2. *Effective Schools.*

With respect to Effective Schools, the State again argues on the one hand that the Effective Schools program should be eliminated because it has been successfully implemented, while on the other hand suggesting that it be eliminated because it has not been successful enough. The KCMSD's far more reasonable approach, however, is to recognize both the program's important achievements and its shortcomings and to revise it in order to make it even more effective. The District does not propose "an entirely new and different plan," *see* State's Response at 25, but rather has modified the program in several important respects to help provide for all schools throughout the District the same success that has been achieved as some schools.

The State is flatly wrong in claiming that the new proposed plan departs from the "bottom up" structure of the original plan; indeed, the new plan will ensure more "meaningful participation by patrons, parents, teachers and administrators at the local school level," *see* June 14, 1985 Order at 21, than the program as currently implemented. The evidence at the hearing will explain that the new proposal will increase the level of central administration support and site-based accountability to ensure that the plans that percolate up from the bottom are both more appropriately designed, more closely related to the school's overall instructional efforts, and more effectively implemented.

The State also misreads the 1990-91 KCMSD Evaluation Report of the current Effective Schools program and, therefore, reaches wholly unjustified conclusions. For example, the State repeatedly cites grade-level data as classroom data, *see* State's Response at 24-25, understating the degree of success achieved. Moreover, the State fails to explain the significance of the "objectives" it claims more classrooms should have met. *Id.* It also cites an evaluation of the Extended Day program without attempting to explain its relevance to the Effective Schools program. *Id.* at 25. The State also makes the incomprehensible suggestion that there should be some meaningful correlation between "the number of reporting classrooms and the academic grade level represented by that classroom." *Id.* Even if such a correlation did exist, it is difficult to fathom its conceivable significance. Finally, the State argues that Superintendent Walter Marks promised improved test scores and failed to deliver, but the State fails to mention that 1992 test data is not yet available to support its contention. More importantly, what the State should acknowledge is that the Year VIII Effective Schools proposal itself represents an important follow through by Dr. Marks.

Similarly, the State's selective reading of the assessment component of the revised Effective Schools program completely misses the mark. The District does not seek to "replace" the focus of the Effective Schools program on math and reading, but rather to supplement it with measures which are more appropriately designed to measure school change over the short term. Student and teacher attendance, student discipline, school climate and progress towards desegregation goals are very relevant to improving math and reading proficiency, notwithstanding the State's assertions to the contrary. *See* State's Response at 26 n.6.

And, these measures will evaluate more accurately the efficacy of the Effective Schools component at individual schools.

None of the State's alleged reasons for opposing the Effective Schools program holds water. *See* State's Response at 27. The program, as the State admits in Section I of its brief, has not failed. The District proposes to modify the Effective Schools program in a way that fully comports with the educational philosophy of the original program and which will ensure that it is better implemented at all schools. Although the Effective Schools proposal is not a "new program," there certainly is no moratorium on redesigned efforts to eliminate the persistent effects of segregation in the KCMSD.

3. *1986-87 Magnets.*

The State's open attempt to escape or minimize its remedial obligations is nowhere more clear than with respect to the 1986-87 Magnets. Pursuant to the joint request of all the parties, *see* Joint Motion for Stay of January 23, 1990 Order (January 31, 1990), this Court, in its February 1, 1990 Order, stayed the effect of prior decisions finding that the base costs of the 1986-87 Magnets would no longer be recognized as a desegregation expense.[10] Twice since that Order this Court has ruled that the base costs of the 1986-87 Magnets should remain in the desegregation budget. *See* June 26, 1990 Order; July 5, 1991 Order. The State and Court are aware of the District's operating budget

[10] Under the February 1, 1990 Order, the Court held, pursuant to *all* the parties' wishes, that pending receipt of a study that determines whether there "are additional resources that could be made available from KCMSD's operating budget to support the funding" of the 1986-1987 Magnet base costs, the October 18, 1989, November 2, 1989, and January 23, 1990 orders of the Court would be stayed and "not deemed final, subject to implementation or execution, or ripe for appeal." *Id.* at 1-2. The Court, of course, has not lifted this stay because the Deloitte & Touche management audit that resulted from that order did not identify funds in the operating budget adequate to support these schools.

situation. The Deloitte & Touche management audit did not reveal operating budget cuts sufficient to support these schools; to the contrary, Deloitte & Touche suggested many investments on the operating side, to enhance the effectiveness of the District's operations. The 1986-87 Magnets have been an academic and desegregative success, and their continuation is a keystone to the success of the magnet school plan. Because funds from some other source are not available to support them, they should be considered as part of this plan.

4. *District Communications.*

The State offers no argument as to why this component should no longer be a desegregation expense. Informing the public about the progress of the KCMSD desegregation plan remains as important today as it was when the Court initiated its first remedial order. Indeed, in no small part because of the State's continued opposition to almost every aspect of the remedy, there is a great deal more negative publicity with respect to the desegregation plan today than when it was first ordered. Accordingly, this component plays a very important role in the success of the remedy and should be continued.

5. *Security.*

The State's position with respect to Security plainly disregards the facts. As the District informed the State at its meeting with State representatives on March 12, 1992, the Kansas City, Missouri Police Department has informed the District that it is unable to provide additional support at District schools. Similarly, the State simply ignores the information provided to it in the District's desegregation plan, through the DMC process and through informal discovery about the necessity for the seven additional security positions and the replacement of security vehicles. Ironically, while the DMC took exception to the District's security proposal because it did not go far enough, the State interposes a blanket objection to virtually every new aspect

of the District's security proposal. And, while the District proposes to provide a greater level of security for its students with a smaller budget, the State responds with sarcasm about the District's alleged self-congratulation, *see* State's Response at 30, and with disregard for the safety of students. *See* State's Response (arguing that since Security program has existed for several years it should be "released from supervision of this court," *i.e.*, terminated). As the evidence at the hearing will show, the security program is vital to the success of the remedy and should be continued.

6. *Special Education Compliance.*

The State argues that Special Education should receive no support through the Desegregation Plan, because the Special Education program is unrelated to desegregation, and because KCMSD specifically chose to exclude a Special Education component from its original remedial plan.

KCMSD made a determination in 1985 that no historical record existed in the Kansas City School District indicating that minority children suffered identifiable deprivation in the area of special educational services traceable to the prior dual school system. As a result, no Special Education component was included in the original remedial plan.

At no time subsequent to 1985 has KCMSD proposed that a specific special education program be included in the Desegregation Plan. Rather, as other components of the plan were implemented,l it became apparent that implementation of the plan was resulting in additional costs for students requiring special education services. Compliance with state and federal laws requires that KCMSD provide comparable "regular" services to handicapped students so that special services designed to address the handicapping condition will be an add-on to services the School District normally would supply to non-handicapped students. As funds spent on regular education

increased through the Desegregation Plan, comparability requirements mandated that additional services be provided to handicapped students. Indeed, the U.S. Office for Civil Rights ("OCR") recently required the District to offer assurances that it would provide comparable Art and Physical Education services for handicapped students at DeLano School to resolve compliance problems identified by OCR in these areas. *See* State's Response, Attachment 1. The State's argument to the contrary notwithstanding, *see* State's Response at 31, these special education services are required only because they are offered to regular students pursuant to the court-ordered desegregation plan; this comparability requirement formed the basis for the 1987 addition of funding categorized as "Special Education Compliance" as a part of the Desegregation Budget.

With implementation of the Long-Range Magnet Plan and the District's efforts to attract additional non-minority students to the District, special education costs have increased. Kindergarten enrollment is up as a result of recruitment efforts. *All* new kindergarten students receive special education screening; the desegregation recruitment success increases the need for these services. The District also had attracted, as a part of the desegregation effort, added enrollment through private school and interdistrict transfers. These students represent a cross-section of the normal student population, and a certain percentage of them naturally can be expected to become a part of the population referred for evaluation by the Department of Exceptional Education. Some are found to require special services of various types; others require only evaluation. In either case, added cost is incurred.

It is inevitable that an increase in the population base being served places an increased work load and increased costs on the Special Education service area. Even though a separate Special Education desegregation component has never been a part of the remedial plan, through evolution of other components of the

Desegregation Plan there has been an impact upon KCMSD Special Education costs. The funding which has been in effect since 1987 began and has continued as a recognition of those costs. The State has offered no basis for discontinuing it.

7. *High School Prep.*

The High School Prep program is a successful program which provides a creative learning environment for students who have suffered the effects of State-mandated segregation in KCMSD. While the State is correct that this Court did not approve desegregation funding for this program this year, *see* October 8, 1991 Order, it completely ignores the reason. *See* Order at 1-2 ("[T]he KCMSD's submission is untimely. The KCMSD should have submitted this program as part of the Year VII budget. . . ."). This program has been designed and presented in a timely fashion for 1992-93 school year, and the evidence at the hearing will show that it already has shown good results. Moreover, the educational problems that otherwise would lead many of the High School Prep students to drop out *are* vestiges of State-mandated segregation in this District, notwithstanding the State's assertion to the contrary. Rather than analyze the High School Prep program on the merits and attempt to determine whether it truly is an effective remedial program, the State just argues that any new program is *per se* unacceptable. This argument, like the State's conflicting claim that all the existing programs should be terminated, is unsupported and illogical.

CONCLUSION

Last year the State argued that the District was not adequately implementing the remedy in this case. This year, the State argues that because the District is fully implementing the *Milliken II* components of the remedy they should be terminated. The State also claims that if this Court rejects this contention, some of these same components should be disapproved because they are unsuccessful. All of these ever-shifting arguments, however,

should be rejected. They betray that the State's mission in this case is simply to get out any way it can, without dealing with the need to do the job of desegregation right and to pursue the task to its successful conclusion.

The District in fact has implemented the *Milliken II* components of the remedy in a responsible manner. These programs, along with other aspects of the remedy, are beginning to show positive results. Nevertheless, lingering vestiges of segregation remain in the KCMSD, and the District's serious efforts to modify and improve the various remedial components proposed for Year VIII are prudent and justified.

For the foregoing reasons and those set forth in KCMSD's Motion for Approval of Desegregation Plan for 1992-93 and Supporting Memorandum, and in light of the Joint Stipulation of the parties and the evidence to be presented at the hearing beginning in May 27, 1992, we respectfully suggest that the KCMSD Motion for Approval of the Desegregation Plan for 1992-93 should be approved and ordered by the Court.

Respectfully submitted,

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

JOINT STIPULATION OF ALL PARTIES CONCERNING KCMSD'S 1992-93 DESEGREGATION PLAN

All parties to this case — plaintiffs, the State of Missouri Defendants ("State"), Kansas City, Missouri School District ("KCMSD"), and the AFT Local Union 691 ("AFT") — hereby submit this Joint Stipulation regarding the KCMSD's Motion for Approval of Desegregation Plan for 1992-93 (filled March 25, 1992). These stipulations reflect the parties' attempt to narrow the factual issues in dispute at the hearing scheduled for May 27, 1992 and reflect the agreement of all the parties.

The State reserves its legal objections, based primarily on the Supreme Court's recent decision in the case of *Freeman v. Pitts*, 60 U.S.L.W. 4286 (March 31, 1992) as fully set forth in State's Response to KCMSD Motion for Approval of Desegregation Plan for 1992-93 (filed April 20, 1992).[1]

[1] AFT Local 691 supports KCMSD's Year VIII proposals, but with the following qualification; the AFT expressly reserves its arguments that the Court should provide no funding for any new desegregation programs or projects, nor any increased funding for existing desegregation programs or

(Footnote 1 continued on next page)

Nevertheless, these stipulations reflect the agreement of all the parties: 1) that with respect to a number of components, there is no other dispute between the parties and if the court rejects the State's argument based on *Freeman v. Pitts*, the parties agree to the budget and scope of the program as proposed;[2] 2) that with respect to one component, no factual issues exist and the legal issues in dispute will be submitted on the briefs; and 3) that certain components will be the subject of a hearing.

1. *Components as to which There is No Factual Dispute Concerning the Proposed Budget.*

The parties stipulate their agreement that with respect to the following components there is no factual dispute as to the budget and the scope of the program proposed, other than that outlined in the State's Response:

* AAA
* Reduced Class Size
* Early Childhood
* Full Day Kindergarten
* Base Budgets
* Interest Expense
* Summer School
* Maintenance

(Footnote 1 continued)

projects unless and until desegregation funding is provided to raise the salaries of KCMSD's teachers and other employees to adequate, competitive levels and that providing salary levels adequate to attract and retain the quality of personnel necessary to implement the existing desegregation programs should be a higher priority than any other new initiatives.

[2]The State, of course, reserves its right to appeal an adverse decision on its *Freeman v. Pitts* argument or any of the factual issues that are the subject of the hearing.

If these components are approved, the budgets for them will be as follows, with joint and several liability:[3]

	1992-93	KCMSD Obligation
AAA	$ 6,675,244	$ 2,846,175
Reduced Class Size	$18,975,675	$18,975,675
Early Childhood	$ 5,435,513	$ 1,170,333
Full Day Kindergarten	$ 2,087,727	$ 521,932
Base Budgets	$ 3,803,432	$ 950,858
Interest Expense	$ 593,503	$ 593,503
Summer School	$ 2,476,844	$ 619,212
Maintenance	$ 4,602,048	$ 4,602,048

2. *Additional Legal Issues Reserved by the Parties.*

The parties stipulate their agreement that the following component will not be the subject of an evidentiary hearing:

1986-87 Magnets - The parties agree to submit their dispute as to the base costs for the 1986-87 Magnets on the briefs.

3. *Components as to which There are Factual Disputes.*

The parties agree that at this point there remain factual disputes among them with respect to the following components that may properly be the subject of an evidentiary hearing:

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[3]The stipulation of the parties with respect to Summer School and Early childhood is conditioned upon the KCMSD'S withdrawal of its request for multi-media equipment dedicated to the Summer School program and certain components of the Early Childhood program objected to by the State. The budgets in the chart above for these two components have been reduced accordingly and replace those originally requested by KCMSD.

* Extended Day
* Effective Schools
* Security
* High School Prep.
* District Communications
* Special Education Compliance

Additionally, factual disputes concerning the *Freeman v. Pitts* issues relating to the components addressed in Section 1 of this stipulation may arise and properly be the subject of testimony at the hearing.

All the parties stipulate and agree that this Joint Stipulation is intended to resolve potential factual disputes about certain components, with the purpose of narrowing the issues requiring a hearing. This Joint Stipulation is not an admission that the components as originally presented were in any way deficient or an admission that further arguments could not be adduced to oppose certain components on which the parties have agreed not to raise certain factual disputes. All parties agree that post-hearing briefs shall be submitted no later than June 5, 1992.

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

ORDER

Upon consideration of the Joint Stipulation of all parties concerning desegregation budget for Year VIII, filed by the plaintiffs, KCMSD, The State of Missouri defendants, and the AFT Local Union 691, and in consideration of the entire record herein, it is hereby

ORDERED that the Joint Stipulation is approved as submitted;

AND IT IS FURTHER ORDERED, upon review of the Joint Stipulation, that rulings on both the continuation of the components and their scope are served pending a hearing on this matter on May 27, 1992. Briefs will be received no later than June 5, 1992.

Russell G. Clark, District Judge
United States District Court

Dated: May __, 1992

APPENDIX R

Excerpts from Testimony of Dr. Walter Marks
(May 27, 1992)

* * *

[18]

Q. Would you state you full name for the record, please.

A. My name is Walter L. Marks.

Q. What is your employment?

A. Superintendent of Schools, Kansas City, Missouri.

Q. And how long have you been so employed?

A. Since March 1 of 1991.

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[57]

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Q. Is the KCMSD currently rated as a AAA School District, Dr. Marks?

A. Yes.

Q. How long has the District had its current AAA rating?

A. I am not positive of what year. It was prior to my coming to the District.

Q. So since coming to the District, you didn't bother to check when that AAA rating was first granted?

A. No.

Q. Dr. Marks, has the provision of AAA status enhanced the quality of educational opportunity in the KCMSD?

A. Yes.

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[62]

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Q. Well, if you prefer to use the words "positive impact" then, has the attainment of Reduced Class Size in the KCMSD had a positive impact on the quality of educational opportunity in the district?

A. In my opinion it has.

Q. Dr. Marks, do you understand the Full-Day Kindergarten of the KCMSD Segregation Plan to be fully implemented currently?

A. I do not consider the Full-Day Kindergarten to be fully implemented until we have achieved desegregation levels and achievement levels that are acceptable to the Court. It's part of the whole.

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[63]

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Q. And Dr. Marks, has the provision of a Full-Day Kindergarten enhanced the quality of educational opportunity within the District?

A. In my opinion and judgment, yes, it has.

* * *

[68]

Q. And has the Early Childhood Education Component enhanced the quality of educational opportunity within the KCMSD?

A. In my judgment it has.

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[76]

* * *

Q. Dr. Marks, can you tell me of any component of the desegregation plan that has not enhanced the quality of the educational opportunity for the KCMSD students?

A. To my knowledge, the programs and the plans that are currently in place enhance the levels of desegregation and student achievement in this District. I know of none that are in place that I would not recommend at this point to go forward.

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[24]

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A. That's the, that was the last point I wanted to make, as this is a Desegregation Plan. And we have got to get desegregation levels. I believe we are making some progress in that. The last two years there has been minimal, in my judgment, minimal progress made.

We are seeing more progress potential now than we have seen in the past, more applications this year, larger numbers of applications. And it looks like we may have, and this is kind of before we have looked at all of the data and we have still got several months to go. But it looks like we are going to reach better desegregation levels in the schools next year than we have had in past years.

The progress is beginning to be made. And I think if you look at the national experts in the area of desegregation, the issue is just to be able to stop the flow of, in this case, white youngsters from the District, just to level that you and stop it is something that has not been done in very many urban settings. That has been done here, and I [25] think that's progress.

And we are beginning now to see the advantages of the plan in attracting back more white youngsters and we see schools where we are reaching that level, and I think getting into the community more, changing the image of the School District to a leadership School District, which we have worked very hard on this year is beginning to take hold. And people that will talk to us now and invite us into the living rooms probably 12 months ago wouldn't have done that.

So I believe we are on the verge of moving ahead with greater stride than we have in the last couple of years, even though some progress has been made. We must remember that

progress is just stopping the exodus, getting a flat table to work from, and that has been accomplished in the School District.

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[46]

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Q. Dr. Marks, I hate to let responding to Mr. Fields' comments this morning sort of take over the agenda here, but while I have you here, I think it is important to have you address one last issue that Mr. Fields suggested. He suggested that perhaps the time has come for, and this has been suggested in the State's brief as well, for the Court to terminate desegregation funding and support for the programs contained in the District's Year VIII plan.

What would happen to these programs hypothetically if all of the Court approval and support that follows it were to terminate for this fall, would the programs be able to be [47] implemented by the District?

A. Well, of course not. I think it's pretty obvious that across this state operating budgets and deseg, you know, are really having great difficulty making it. We have tried here to get our operating budget in shape, and we have to cut $10 million out of the operating budget because of reduction in revenue both locally and at the state level to just balance that budget, because we have got to keep the operating budget balanced.

We are having great difficulties just maintaining the School District as it is, as most school districts in the state are having. People fail to realize that we have an operating budget we have got to keep balanced also. So I don't think they would, you know, I see absolutely no way that we could continue these programs if we did not have funding as it is set out in this document.

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[63]

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Q. Dr. Marks, do you understand the Court orders in this case to mandate that a particular desegregation ratio needs to be reached before Full-Day Kindergarten can be considered fully implemented?

A. No, I do not.

Q. Do you understand the Court orders in this case to mandate a particular level of student achievement needs to be reached before the Full-Day Kindergarten Component can be considered fully implemented?

A. No.

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[73]

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Q. Dr. Marks, you don't consider any component of the desegregation plan to be fully implemented unless, among other things, the District schools have reached a ratio of 60 percent white and 40 percent minority; isn't that correct?

A. What we are using internally as guidelines are the admission guidelines, the 60-40. So we are looking at a 60-40 on a school by school as well as district-wide as a goal or [74] guideline from which to plan and work toward. That is an internal goal for us to meet.

Q. So you are saying then that you realize that this 60-40 ratio is not Court imposed?

A. I realize that.

Q. I'm sorry?

A. Yes, I realize that.

Q. And also , Dr. Marks, you won't consider any aspect of the desegregation plan to be fully implemented until, among other things, the District schools have each reached the 50th percentile in student achievement; isn't that correct?

A. What we are using as a goal internally is that we want every school and we want the District to reach the national norm, the 50th percentile as a goal from which to plan and work toward as we began to set the guidelines and objectives by school and district. Those are internal, totally internal goals and objectives we are trying to meet as we plan for the future.

Q. You also understand then that this 50th percentile goal that you stated is not imposed by the Courts?

A. Yes, I am aware of that.

Q. In fact, Dr. Marks, the District could have chosen any other desegregative goal; couldn't it?

A. Yes, it could have.

Q. It could have chosen say 65-35?

[75]

A. We could have chosen a different number as a goal

Q. It could also have chosen some other level of student achievement; isn't that right, say the 60th percentile instead of 50th?

A. Yes. And there was a lot of discussion on staff about assigning the same achievement ratios as Shawnee Mission has, since we need to be suburban comparable, but we rejected that because we thought that might take us too far in the future, but we could have set it at 92 percentile.

Q. So Dr. Marks, to say that a given component of desegregation program won't be fully implemented until the District's own internal desegregation and student achievement goals are met, aren't you really telling this Court that it's up to the District to decide when a program has been fully implemented?

A. I would never be so presumptuous to tell a judge or a court when that occurs. That's not in my jurisdiction. It is in my jurisdiction to set internal goals and objectives to be achieved. And that's what we have done.

Q. Dr. Marks, in the event that the District enunciated desegregation and student achievement goals aren't met for another 100 years, is it your intention that that Court should continue to order state funding for those KCMSD programs until that time?

A. I personally wouldn't offer an opinion on that. I think **[76]** that's outside of my jurisdiction to decide on. I think that's something that will be argued in this courtroom, and that decision will be made by people other than myself.

Q. So then, are you saying then that there could be a time limit in the event that your particular student achievement and desegregative goals are not reached?

A. There certainly could be. Somebody could determine that.

Q. Dr. Marks, can you tell me of any component of the desegregation plan that has not enhanced the quality of the educational opportunity for the KCMSD students?

A. To my knowledge, the programs and the plans that are currently in place enhance the levels of desegregation and student achievement in this District. I know of none that are in place that I would not recommend at this point to go forward.

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[77]

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Q. Dr. Marks, I am going to hand you now a document that has been labeled for identification purposes as State's Exhibit No. 2. Without saying what it is, Dr. Marks, could you say please, if you recognize that document?

A. I have seen this document, yes.

[78]

Q. Do you recognize it to be any particular document?

A. It's an evaluation document of Effective Schools in the reading and mathematics area.

Q. Is it prepared by the KCMSD?

A. Yes. It was prepared by the evaluation office.

MR. EDELMAN: The state would move at this time, Your Honor, for the introduction of the evaluation of Effective Schools Reading and Mathematics Outcomes for 90-91 document, State's Exhibit 2, to be introduced into evidence.

MS. BRANNAN: No objection.

THE COURT: Exhibit 2 will be admitted.

Q. (By Mr. Edelman) Dr. Marks, if you refer to page VI, there is a table on that page entitled number and percent of KCMSD schools who achieve their ITBS and TAP reading objectives for the 1990-91 school year; isn't that correct?

A. Yes. It's on that page.

Q. Now, at the bottom of that table, Dr. Marks, there is a total showing that 274 school grades were measured for the purposes of this table; isn't that correct?

A. That's correct.

Q. And in fact out of that 274 school grades that were measured, the chart shows that only 46 school grades actually met their objective; isn't that correct, Dr. Marks?

A. That's what the table shows.

Q. And in fact, the table also shows, doesn't it, that that **[79]** 46 out of 274 translates to 17 percent?

A. That's what the chart shows.

Q. Dr. Marks, are you telling this Court that the Effective Schools Reading Program has been successful, when only 17 percent of the school grades measured have met their objectives?

A. I believe this data was collected the year that I came to the School District. If you will look at the date, it's not collected on the current year, and the data shows some degree of success. As to what level of success would be appropriate or acceptable, I am not capable of really doing that. I don't know if that would be significant or nonsignificant, but a researcher would have to respond. But I would certainly think that we could do better than 17 percent.

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APPENDIX S

Exerpts from Testimony of Mr. Arthur Rainwater (May 27, 1992)

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[100]

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Q. (By Mr. Borkowski) Mr. Rainwater, I would like to ask you a few questions first of all about the progress that the District has made in its implementing its desegregation remedy, and I am going to bring an easel over and set it up here. If you could just come down and use it to illustrate your testimony.

I tell you what, let me ask you, first of all, what this first chart here represents, Mr. Rainwater?

A. The first chart is a comparison of the percent of district elementary schools that we have and their relative number or percentage of minority students. It's a comparison between 1984-85 and 1991-92.

Q. Okay. What does the dark section at the top of each circle represent?

[101]

A. The dark section represents the percentage of — the dark section on each chart represents the percentage of the schools that have 90 percent or more minority students.

Q. What does the comparison of the two circles show about that percent?

A. The number of schools, the percentage of schools is decreased. In 1984-95 [sic] from 38 percent of the School District schools with 90 percent minority to its current 19 percent, with 19 percent minority.

Q. What grade level does this chart refer to?

A. This chart, I believe refers to the District as a whole — I am sorry, elementary schools.

Q. Okay. Could you turn to the next chart please.

What is represented on this chart, Mr. Rainwater?

A. This is the same comparison for our middle schools. Again, showing 33 percent of our schools in 1984-95 [sic] that were 90 percent or more minority, and 18 percent in the '90 — the 91-92 school year that are 90 percent minority.

Q. Can you flip to the next chart.

A. The next chart, the same comparison for our high schools with a change in 84-85 from 33 percent of our schools being 90 percent minority to 20 percent during this school year.

Q. Okay. What do the other pieces of pie, so to speak show?

A. The other pieces of the pie basically show the gradations **[102]** moving down: the green being 80 to 90 percent minority; the blue being 70 to 80 percent; the orange or brown being less than 60 percent minority.

Q. Mr. Rainwater, let me hand you a series of documents which have been marked as KCMSD Exhibit 15-A, B, C.

Can you identify those documents?

A. Yes. These documents are identical to the three charts that we have just looked at.

Q. Okay. And have you verified that these charts accurately reflect the District's enrollment data for these years?

A. Yes, they do.

MR. BORKOWSKI: Your Honor, KCMSD would move the admission of Exhibits 15-A, B and C.

MR. MATANIC: Your Honor, I have no objection to the admission of the exhibits; it doesn't vouch for their accuracy.

THE COURT: Exhibits 15-A, B and C will be admitted.

Q. (By Mr. Borkowski) What generally, if you could summarize, do these three charts indicate about the status of the District in terms of desegregation in your view?

A. In my view it shows very clearly that the District has successfully began to implement a process that has reduced racial isolation in the District, and it shows that at each of our organizational levels.

Q. Does, in looking at the 1991-92 charts, does a **[103]** significant degree of racial isolation remain?

A. Yes. It does. At the high school level that's still 20 percent of our schools have kids that re in virtually isolated situations.

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[107]

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Q. What subject area does this chart address?

A. The chart we have here addresses reading.

Q. And what does the top pie indicate?

A. The red indicates those schools that are at or above national norms in reading, and the gray represents those schools that are below national norms in reading. And that's for 1985.

Q. What about the bottom chart?

A. The bottom chart would be exactly the same representation in terms of the red representing those schools and subtests at grade levels that are above national norms, and the gray representing those that are below national norms.

[108]

Q. What does the comparison between 1985 and 1991 show, Mr. Rainwater?

A. The comparison very clearly shows that we now have more grade levels and more schools above national norms than we did in 1984-85. The actual comparison is about 16 percent at or above national norms in '85, and 28 percent now above national norms.

Q. Mr. Rainwater, what does the large gray area in the 1991 pie represent?

A. This represents our schools that are still below national norms on various grade levels.

Q. What does that say to you about the progress the District needs to make in terms of improving student achievement in this area?

A. I think it clearly indicates that while we have made positive progress things that are changing, that we still have a long way to go in terms of achieving for our students the level of achievement that they should have.

Q. Would you turn to the next page on the easel please, Mr. Rainwater.

Would you describe for us this chart?

A. That is the same representation as applied to the mathematics subtests. The color coding is exactly the same. Twenty-eight percent of our schools in 1985 were at or above national norms. Now we have 45 percent at or above national [109] norms in 1991.

Q. So is it fair to say that the District has made greater progress in mathematics than in reading?

A. Yes. This chart would indicate that.

Q. And what about the bottom chart, that the comparison, how would you compare the pink and the gray sections?

A. Well, we are now at about 50-50. It appears that with our schools failing on either side of the line, we still have a long way to go. We will not have achieved what we would like to achieve until this chart is basically all red.

Q. Mr. Rainwater, I am handing you a copy of what has been marked as KCMSD Exhibit 18; it's a two-page exhibit. Can you identify that please?

A. Yes. This is a smaller representation of the graphs that we have just been through.

MR. BORKOWSKI: Your Honor, KCMSD moves the admission of Exhibit 18.

MR. MATANIC: You Honor, again, objection is to relevance.

THE COURT: It will be admitted for whatever value it may have.

Q. (By Mr. Borkowski) Mr. Rainwater, would you turn to the final page on your easel.

What is on this chart?

A. This is basically the same representation except applied [110] to language arts and written expression. It shows, again the same trend, 33 percent of our schools at or above national norms in 1985. We are now at 47 percent at or above national norms today in this area. Again, indicating that we have made substantial progress here; but in fact still have work to do for many of our children.

Q. Okay. Let me hand you KCMSD Exhibit 19.

Let me ask you if you can identify that document?

A. Yes. This is a smaller representation of the same charts.

MR. BORKOWSKI: KCMSD moves the admission of Exhibit 19.

MR. MATANIC: Again, Your Honor, State objects to the relevance of the exhibit.

THE COURT: Well, it will be admitted.

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[111]

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Q. (By Mr. Borkowski) Mr. Rainwater, before I ask you some questions about another area, can you summarize for me what the things we have just been talking about, about the charts of students in 90 percent minority schools, this achievement data, what conclusion it has led you to reach, as Associate Superintendent for Instruction, about the District's progress?

A. My conclusion is that what we are doing is working, that it is going to take time to accomplish its goal, that we have made a successful start. And that we need to continue along the same road that we are going, and that we'll continue to see the same kind of progress.

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[162]

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Q. Mr. Rainwater what are the vestiges of desegregation in the District?

A. I think we saw that very clearly illustrated on the chart. We still have a substantial number of 90 percent or more minority schools. We still have, again, a substantial number of 80 to 90

percent minority schools. I think we saw that our achievement levels are much lower than they should be.

I believe all of those things in terms of our students still being in racially isolated schools and having **[163]** low achievement levels, I think all of those things point to the vestiges of segregation.

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[184]

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Q. Let me just ask you a question, Mr. Rainwater, that I think will try to summarize, I will try to summarize your testimony here on cross-examination.

Is it the case that the District, in your view, has done its upmost to comply with the Court's order with respect to the 14 continuing programs that are proposed for next year?

A. Yes, we certainly have.

Q. And I take it, Mr. Rainwater, that it's fair to say that your testimony earlier indicated that in some respects you don't believe that the District has yet achieved the goals of **[185]** those programs?

A. That's correct. I do not believe we have.

Q. You testified earlier that you thought these programs were part of an integrated whole, and you had some cross-examination questions about that?

A. Yes.

Q. Can you explain more fully what you mean by these programs are part of an integrated whole?

A. Certainly. I think that all of the programs ordered by the court, including every part, it's tied together to try to desegregate

the School District and to raise student achievement. All of those are necessary to depend upon each other. What I do not know at this time is what that specific relationship is to each and every single part, in terms of if you withdraw this part, how does that affect and roll out into every single other piece. So as anything would relate to the capital improvement program, for example, without some really indepth analysis to say okay, what happens when you do this, I don't know, but I believe that all of the orders of the Court are totally integrated.

Q. Let me ask you just a question. For example, if the District did not have the Reduced Class Size component of the Year VIII program, would that affect other components of the Year VIII proposals?

A. Certainly.

[186]

Q. Why is that, how would that affect them?

A. Well, the Reduced Class Size component, first of all, limits the number of kids that you have in the classroom. It would have an impact on the kind of support services that we provided under AAA. For example, it would change that number of teams. The more kids that you put into a classroom, the more problems you have academically and everything else, so you have now changed the role of the counselors that are funded under AAA, I mean you could go on and on, on and on. Each piece reacts to the other.

Q. Would it affect the District's ability to effectively implement the long range management?

A. No question. If you increase class sizes to, but I haven't done all of the numbers of this, but without reduced class sizes, you are looking at classes probably somewhere between 30 and 40 kids and that would significantly impact our ability to attract people to come in from outside the District and to stay into the

District. They are not going to leave schools where they have smaller class sizes to come into crowded classes that they know are not going to be effective concerning achievement.

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[187]

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Q. Has the District made the progress to the extent practical in achieving desegregation and improving achievement?

MR. MATANIC: I object to the question. The witness has just testified that the KCMSD has done its upmost to comply with the Court orders.

MR. BENSON: I am not asking about complying with the Court's orders.

THE COURT: That wasn't the question.

A. I believe that we have made the kind of progress that **[188]** should be expected at this stage of this complex kind of remedy.

THE COURT: I think the question that you have reached.

Q. (By Mr. Benson) Have we gotten as far as we can practically expect to go?

A. No, I am sorry. I didn't understand the question. No, no.

Q. Now with respect to each of these components that Mr. Matanic just asked you about, if given more time and continued compliance with the Court's order, it is practical to expect us to continue to make progress?

A. Yes.

* * *

Q. Would some of the desegregation programs not have that [189] effect, have no effect on the LRMP, I can give you a list if that would help you.

A. I can try to answer the question generally if that's acceptable, and you can, if you want to, go down the list. That will be fine.

Q. All right.

A. Generally speaking, my understanding of the way that the Court orders work, from my standpoint as an implementor, the primary means of desegregation, in terms of attracting and changing the demographics of the District, the primary means of doing that is the Long Range Magnet Plan.

The other programs, in my view, as an implementor, the other programs work to make that happen. Regardless of how attractive a Magnet Program is, for example, if parents do not feel safe in that school, they are not going to choose to send their precious children to that school.

So the security proposal impacts whether they do that or not. If class sizes are not small and contribute to a strong student achievement base, then parents are not going to choose to send their kids to a place where they know that are going to get an education — to a place where they can very easily see that they are not.

You can go on down the line with every single one of them. I believe every single one of those components contributes to allow the Long Range Magnet Plan to, in turn, [190] attract people to come into the District and to hold the people that we currently have, which I think is an important aspect.

You have got to remember, that one of the most important things that we have done is that we have stopped, we have stopped segregation, and we have begun to turn that back. Every

one of those components is critical to allow the Long Range Magnet Plan to do that.

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[158]

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Q. And has the attainment of AAA enhanced the qualities of the educational opportunity available in the District?

A. Yes.

Q. And is the AAA component fully implemented?

A. No.

Q. Are any of the components fully implemented?

[159]

A. No, they are not.

Q. Why are none of the components fully implemented?

A. They have not accomplished the purpose for which they were ordered.

Q. What was that purpose?

A. The purpose was to achieve desegregation and to change the levels of achievement in this District to eliminate the vestiges of segregation.

Q. What are the desegregation and achievement levels which the District is striving to meet?

A. I am not aware that the Court has set those.

Q. Are you aware of any Court order that requires a particular goal for either numerical desegregation or student achievement?

A. I am not aware of such a Court order.

Q. Is it your contention that until those desegregation and achievement levels are met that the remedial plan must continue?

A. Yes. That would be my understanding.

Q. Regardless of how many years it would take?

A. Regardless of how many years it would take.

Q. Even 100 years?

A. Regardless of how many years.

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[164]

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Q. Has attainment of Reduced Class Size enhanced the quality of educational opportunity available in the District?

A. Yes.

Q. Has it increased individual attention and instruction?

A. Yes.

Q. Has it increased the potential for desegregative educational experiences for KCMSD students by maintaining and attracting nonminority enrollment?

A. Yes.

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[166]

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Q. Lets talk about Full-Day Kindergarten. Has the District complied with the Court's order as to provisions of the Full-Day Kindergarten Program?

A. Yes, it has.

Q. Has the provision of a Full-Day Kindergarten enhanced the quality of education available in the District?

A. Yes, it has.

[168]

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Has the District complied with the Court orders to provide Early Childhood?

A. Yes, we have.

Q. Has that program enhanced the quality of educational opportunity available in the District?

[169]

A. Yes, it has.

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[171]

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Q. Let's talk about Effective Schools, Mr. Rainwater.

Has the District complied with the Court's order to provide the Effective Schools Program?

A. Yes, we have.

Q. Did it enhance the quality of educational opportunity available in the District?

A. I believe it did, yes.

Q. Did the Extended Day?

A. Yes.

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[179]

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Q. Has provision of the Base Budgets Program and the District Communications Program enhanced the quality of educational opportunity available in the District?

A. Yes.

Q. Have those two programs been effective programs?

A. Yes, I believe they have.

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[165]

* * *

Q. Let's talk about Summer School.

Is the District in compliance with the Court's orders as to Summer School?

A. Yes, as far as I know.

Q. Has the provision of the Summer School Program enhanced the quality of educational opportunity available in the District?

A. Yes, I believe that it has.

Q. Has it been effective in desegregating the District?

A. I am not sure of its effect. I believe it has.

Q. Has it provided remedial and developmental learning experiences for elementary and secondary education level students?

A. Yes.

Q. Has it provided reinforcement and enrichment for secondary education students?

A. Yes.

Q. Has it provided a desegregative learning experience at [166] both elementary and secondary level?

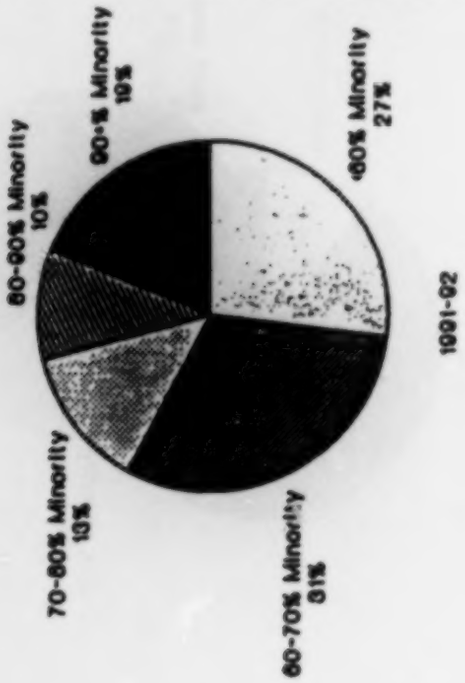
A. Yes, it has.

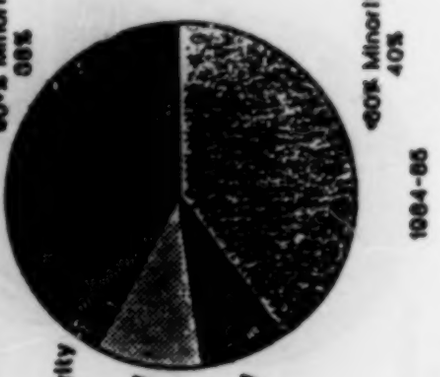
* * *

APPENDIX T — KCMSD Exhibits 15a-c

KCMSD Exhibit 15a

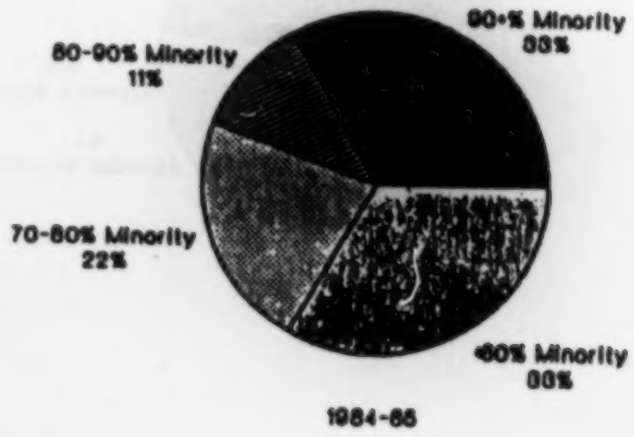
Percent of District Elementary Schools with Minority Enrollments of 90+%, 80-90%, 70-80%, 60-70%, or <60% in 1984-85 and 1991-92

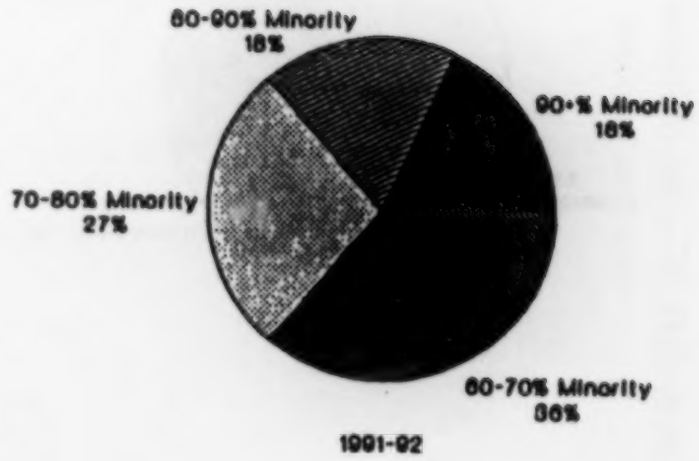




KCMSD Exhibit 15b

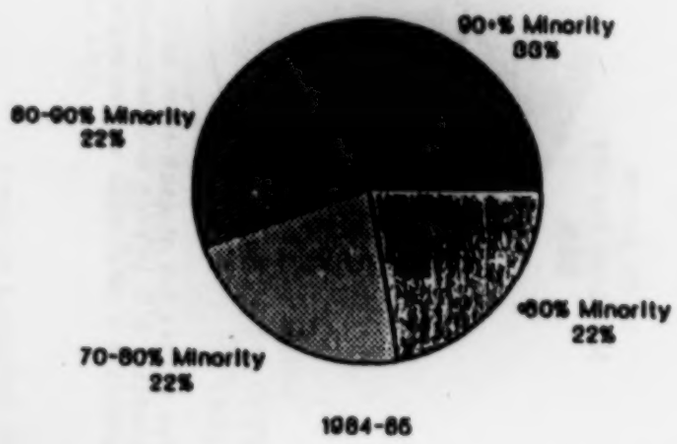
Percent of District Middle Schools with Minority Enrollments
of 90+%, 80-90%, 70-80%, 60-70%, or <60% in 1984-85 and 1991-92

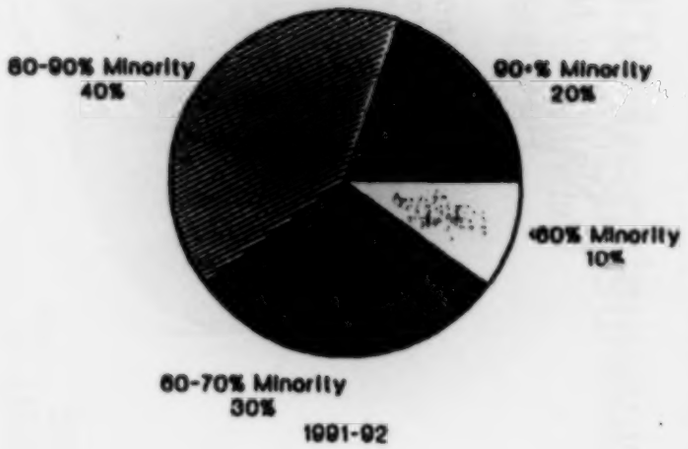




KCMSD Exhibit 15c

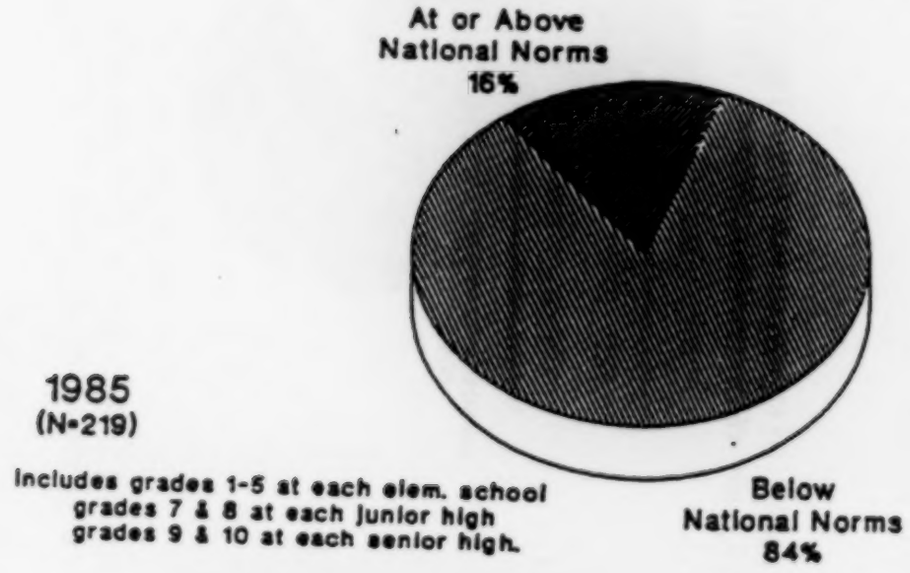
Percent of District High Schools with Minority Enrollments
of 90+%, 80-90%, 70-80%, 60-70%, or <60% in 1984-85 and 1991-92





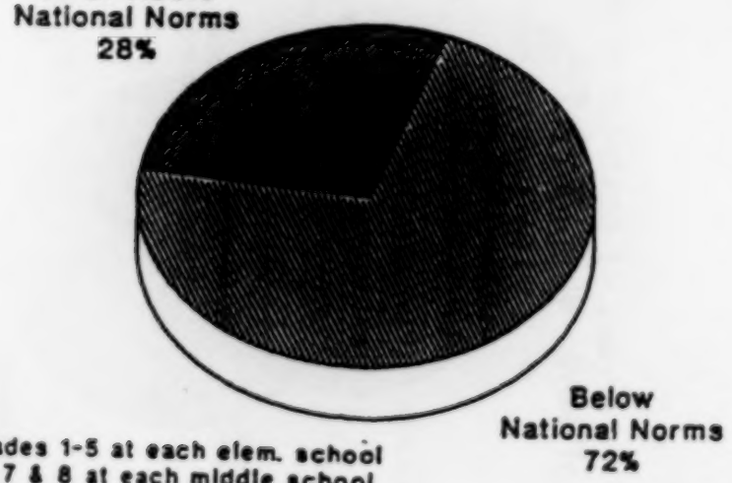
APPENDIX U — KCMSD Exhibit 18 (May 27, 1992)

Relationship of KCMSD Schools
to National Norms
Reading



1985
(N=219)

Includes grades 1-5 at each elem. school
grades 7 & 8 at each junior high
grades 9 & 10 at each senior high.

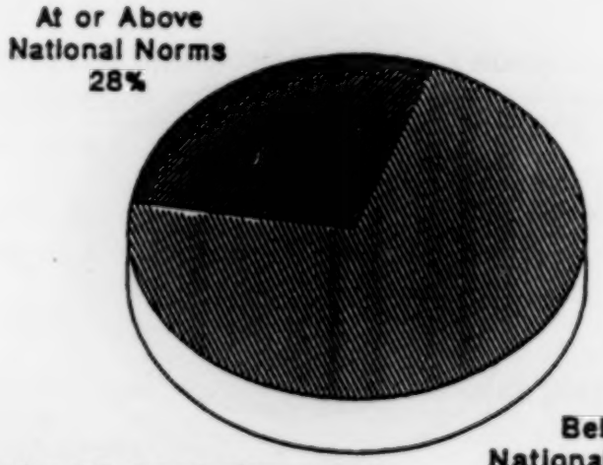


1991
(N=265)

Includes grades 1-5 at each elem. school
grades 7 & 8 at each middle school
grades 9 & 10 at each senior high.

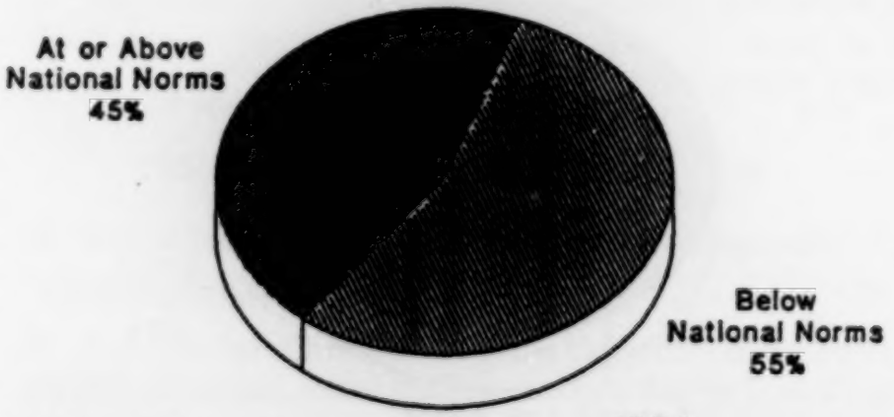
Exhibit 18 continued

Relationship of KCMSD Schools
to National Norms
Math



Includes grades 1-5 at each elem. school
grades 7 & 8 at each junior high
grades 9 & 10 at each senior high.

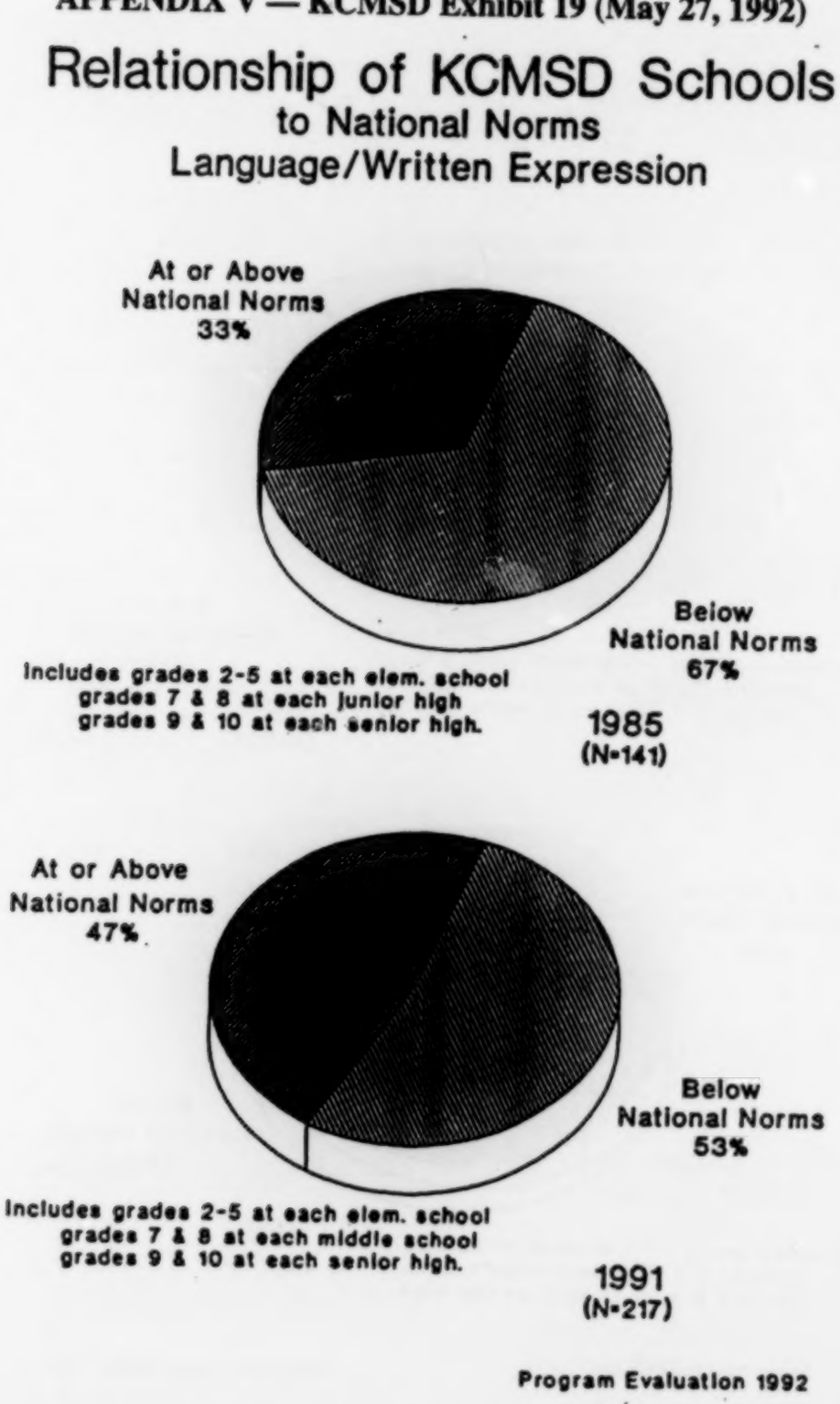
1985
(N=219)



Includes grades 1-5 at each elem. school
grades 7 & 8 at each middle school
grades 9 & 10 at each senior high.

1991
(N=265)

APPENDIX V — KCMSD Exhibit 19 (May 27, 1992)



APPENDIX W

Transcript of Direct Examination of

Dr. Terrance Stewart (May 28, 1992)

* * *

[447]

MR. FIELDS: Good afternoon, Your Honor. We have decided to switch the order of the witnesses in hopes that maybe we can get done this afternoon.

TERRANCE STEWART, called as a witness on behalf of the State, being first duly sworn, testified:

DIRECT EXAMINATION BY MR. FIELDS:

Q Would you state your name for the record, please.

A. Terrance Stewart.

Q Welcome back to the case, Dr. Stewart. We haven't seen you in a couple of years, at least in testimony. What's your current employment, Dr. Stewart?

A The Missouri Department of Elementary and Secondary Education.

Q Would you summarize your -

THE COURT: Would you put this mike on -

Q Would you summarize your educational background for the Court, please.

A Yes. Bachelor's degree from the University of Missouri in general education, social studies; master's degree from Central Missouri State University in general - or secondary school administration; a specialist degree from the University of Missouri. A specialist degree is the degree that's required to become

superintendent in Missouri. And then a doctorate degree from the University of Missouri in education with major area in general administration and a **[448]** secondary area in curriculum and instruction.

Q Okay. Dr. Stewart, I believe you have a copy of your resume.

A Yes.

Q I'll show you what has been marked as State's Exhibit 10 and ask if you can identify that.

A Yes, that's my resume.

Q Before we get to that, could you also summarize your professional background for the Court.

A I was a teacher in the Park Hill School District for two years, social studies teacher; principal for four years; a superintendent of schools for eight years, and I am now just completing my 8th year as an employee of the Department of Elementary and Secondary Education.

Q And does State's Exhibit 10 fairly and accurately summarize your professional and educational background, Dr. Stewart?

A Yes, it does.

MR. FIELDS: I move the admission of State's 10.

THE COURT: State's 10 will be received.

Q (By Mr. Fields) How long have you been involved, either directly or in a supervisory capacity, in the Kansas City desegregation case?

A Since June - no, September of 1984.

Q. Would you describe for the Court your direct **[449]** participation in the case.

A In 1984 the Court's liability order was handed down and then it became the duty of the parties to fashion a remedy for the Court. My involvement began at that stage in the development of the remedy on behalf of the State. I worked with the State officials to develop the remedy.

I also during that time in that capacity reviewed all the remedies and the plans submitted by the other parties, listened - sat out here in the courtroom and listened to the experts and the testimony that was given through the various hearings, read all the Court's orders that came from those hearings.

After the orders were - came down and we were in the implementation phase of the various orders, I attended all the MC meetings, the monitor committee meetings, and continued to read the various motions and the filings and briefs that came back and forth, continued to read all the documents from our department that came to the District, and continued to work with the District on the implementation.

Q And in the course of that, both the development of the remedy and monitoring the implementation of the remedy as it proceeded on, did you get involved in negotiations with the School District officials?

A There were several items in the early years where we worked together to try to fashion or to try to work out some **[450]** of the differences. Particularly I think what comes to mind is the Early Childhood Program, but there were other issues also, so I worked with several of the District officials during those days.

Q Many of those officials that you worked with still around?

A No, they're not.

Q Have you also been involved in the St. Louis litigation?

A Yes, to a lesser extent and a few less years, but, yes, probably for about five years. The same kind of supervisory management kind of responsibility.

Q What was your title at the Department of Elementary and Secondary Education when you were involved in direct activity relating to the Kansas City case?

A It was the coordinator of administrative services.

Q And in that capacity, did you also have duties relating to the provision of educational services in areas of the state other than Kansas City?

A Yes. The coordinator of administrative services position was a newly created position. The department wanted to enhance its ability within the Division of Administration to cut across all division lines and work with all the various divisions in our department. My duties - I think the reason that I was employed there is because of the background I had in school administration. They wanted **[451]** somebody there who was familiar with a wide array of educational programs, and my duties there, my responsibilities and supervisory responsibilities included working with things within the Division of Administration, the school finance section as it pertains to the distribution of monies, the transportation section as it pertains to the distribution of the transportation monies, and the rules and regulations there, and the other sections within the Division of Administration, the school data section as it gathered data, but the main responsibility really for that position was to coordinate all of the activities within our department as they affect and pertain to school districts, and that's where the responsibility to cut across division lines came into play. My job was to work with the Division of Instruction as it worked with school districts on the classification program. Not so much to do the classification but make sure that it was a coordinated effort with the other divisions within our department, and the same is true for the Division of

Vocational and Adult Education and Urban Education and the others.

Q How about the Division of Curriculum Instruction?

A Well, that's where the classification section is, is in the Division of Instruction.

Q And in the course of your duties as coordinator, did you became familiar with the various educational offerings that **[452]** are provided by school districts throughout the state?

A Well, in the course of that responsibility and the one that I have now, part of the responsibility - maybe I could just do that, just jump to that. Currently my job is assistant commissioner for the Division of Administration.

Q When did you get appointed to that position?

A That was in June of '89.

Q All right. You were going to expound on your duties.

A The Department of Elementary and Secondary Education has six divisions, and the divisions, for the most part, are kind of discrete bodies. For example, the Division of Special Education handles special education kinds of issues, and they don't really cross lines into another part of the department. The Division of Vocational and Adult Education does the same kind of things they are all discrete within themselves. The Division of Administration is the one division that has the responsibility to cross all these division lines and coordinate the administration of the services to the 540 school districts. It's a rather involved process.

There are thirteen directors in the Division of Administration who report directly to me and many of them have that same responsibility. Now, what I mean by that, if you were to look on the resume, the school finance section as an example, they are responsible to distribute most of the monies that goes to

school. That's even monies that are [453] calculated and worked in the Division of Special Education or in the Vocational Education Division. So the staff that I am responsible for have responsibilities that are department-wide.

The same would be true for the school data section. Those people are responsible for gathering a great deal of data all across the department, all across all division lines, data that has to do with class sizes, enrollments, anything pertaining to teachers, anything pertaining to tax rates and revenue and assessed valuations for school districts, a whole wide array of data that pertains to the curriculum of school districts and the instruction, the classification of the school districts, whether it's AA or AAA.

Q And this data is data that is collected by the Department of Elementary and Secondary Education from the school districts?

A It's collected from the school districts. It's collected and assimilated in the Division of Administration, one of the sections over which I have responsibility. So all this is kind of a long answer to come back to you to say that because of those responsibilities and because of the people that I supervise and because of the documents that we have to work with, I have worked with virtually everybody within our department and every division, all the directors and become [454] knowledgeable of how the various programs work in the department and throughout Missouri.

Q Do you also have legislative duties that involve the use of this data that's collected from the school districts?

A One of the items on the resume has to do with the budget. Well, the answer is yes. It has to do with the budget. It's my responsibility to represent the Department of Elementary and Secondary Education in all the budget hearings in front of the General Assembly, whether it's in the House Appropriations

Committee or the Senate Appropriations Committee, and in order to do that and to do that effectively, and hopefully, I have been effective at that, is that I have to have the kinds of information and knowledge that pertain to absolutely every program that's in the public schools in Missouri, because when we make a budget request, the budget request is $1.2 billion and then a little extra for some other things, the members of the General Assembly will ask whatever question they wish on whichever program they wish, and so I have to have the kinds of information and knowledge that's necessary to be able to respond to those kinds of inquiries.

Q As an aside, I understand the legislature has made a little addition to the Department of Elementary and Secondary Education budget that has some relevance to this case.

A Yes, they appropriated 297.3 million for desegregation. [455] It's reflected what is estimated to be the State's share for both Kansas City and St. Louis.

Q So in the course of your duties, then, both in administering the educational programs throughout the State and in your legislative duties, you are very frequently involved in requesting data from the various sections of the Department of Elementary and Secondary Education?

A Yes. I receive - I request and receive a great deal of information on almost all the programs, and it has to be that way. It's kind of hard to believe, but our budget document is truly five or six inches thick, just full of data that explains the various programs.

Q When you are speaking of various programs, you're not talking about programs internal to DESE.

A No. I'm talking about all services that go to the public schools, to all 540 public schools.

Q In the course of your preparation for testimony here, have you also had occasion to ask the various sections of the department to provide you with data?

A Yes, I have.

Q Okay. Have you also continued to be, in your role as assistant commissioner, have you also continued to be involved in the monitoring and implementation of the Kansas City remedial components?

A Yes, I have. In the early days, we did not have a **[456]** section of desegregation services. I think probably I was that section. But here within the last couple of years we have been able to create a section of desegregation services. We have a director there and staff there, and that section and staff keeps me informed about the Kansas City desegregation program, as do all the other sections keep me informed, so I receive daily reports from the director. I am carboned on every letter that comes out of our department to the Kansas City School District so I have read every letter for the last several years that's gone. I don't read as many of the court orders as I once did, or of the filings as I once did, or of the DMC minutes as I once did, but I still read those and read parts of those, those that are brought to my attention by the staff.

Q Have you also maintained your familiarity with the court's orders in your position as assistant commissioner?

A Yes.

Q In your position as both coordinator and assistant commissioner, have you continuously monitored the status of the programs which is characterized as the Year VIII Intra-District budget programs insofar as the establishment of those programs and the continuous operation of those programs since the 1985-86 school year?

A Yes.

Q And what does your review of those programs consist of?

[457]

A I think it's the same as I just mentioned. I review every letter that's sent to the District. I review the filings and the motions and the briefs that are provided by my staff. I receive updates and reports just daily from the director of the desegregation services section. I attended another monitoring committee meeting here just a couple months ago, just for old time's sake, just to keep myself informed of what's going on in the monitoring committee meetings. It's mostly just review of the materials and the updates from the staff.

Q Dr. Stewart, do you believe that your experience and your background and your current duties as they relate to the desegregation program in the Kansas City case would be helpful - would enable you to offer information that would be helpful to the Court in terms of understanding the implementation status of the various programs and comparing the implementation status of the various programs in Kansas City with school districts in the surrounding suburban area, as well as throughout the rest of the state?

A Yes, I do. When I look around the courtroom here, I have been involved in this program now for eight years, almost eight years, and I can see Arthur Benson and Dr. Eubanks and Shirley Keeler and the Court have been involved as long or longer than I have, but I don't believe there's anyone else here that has been involved in this program for **[458]** that amount of time. I have also been involved in the St. Louis side, and I failed to really mention my involvement with schools, not only do I gather data for schools but I have a primary responsibility to be out into the schools. I have been in virtually every school district in Missouri, not every one but almost every one. I certainly have been in every school district in the suburban area here in Kansas City

and in many of their buildings and in several of the buildings here in the Kansas City School District, so I think that eight-year familiarity with the program and the familiarity with all the school districts in Missouri and the data from all that allows me to make some sort of a judgment on these things.

Q All right. Let's take a look at some of the individual programs, then, that make up the VIII year budget. Have you reviewed the District's pleading requesting - and plaintiff's pleading, requesting various VIII year budgets?

A Yes.

Q What is your understanding - let's talk about AAA first. What is your understanding of the requirement of the Court with respect to AAA in the Kansas City, Missouri, School District?

A Well, there were several requirements for that component of the plan. One of the requirements was to improve the library resources, and by resources in that sense, I really **[459]** just mean those items that are in the library that students may use, the books, the periodicals, the film strips. The things that are on the shelf. The Court asked or directed that the resources be brought up to meet and to barely exceed AAA standards for resources in the library, so that was one of the components.

Along with that, the Court asked or directed that the number of librarians be increased, again to meet and barely exceed the AAA standards so that the ratio of librarians to pupils would be reduced from what it was prior to the Court order and be enhanced. The same would be true for counselors or the additional number of counselors were ordered to reduce that ratio and enhance the services that were provided by counselors. And then the same is true for art, music, and PE teachers, and then some additional teachers and teacher aides.

Q All right. Dr. Stewart, do you know whether the KCMSD has now attained AAA status?

A Yes, they have.

Q And do you know how that occurred?

A They attained AAA status in all the areas in '85-86 except for the libraries and the libraries took just a little bit longer. They attained AAA status in their libraries in the '87-88 school year and the Court recognized both those achievements in its June '86 order and then in its July 5, **[460]** 1989 order.

Q What does full AAA status mean?

A Well, AAA, full AAA status is reflective of the educational opportunities that are available in the district. It's reflective of a higher opportunity in terms of number of resources that are available to the students, in terms of the class sizes, the pupil-teacher ratios, in terms of the number of counselors and librarians that can provide services to the students, and it's reflective of a higher educational opportunity as compared to the lower standard of AA.

Q All right. Was the Kansas City, Missouri, School District rated AAA prior to the 1985-86 school year?

A Not for some years. I think they were rated AA from 1977 to the time of the Court's order.

Q What does AA mean?

A It's reflective of the lower standards. In other words, it means there's fewer books in the library. The pupil-teacher ratios are not quite as conducive to learning. They are higher. There may not be as many counselors available for the district.

Q To your knowledge, has the KCMSD maintained AAA status continuously to the present time since it was first awarded in 1987-88?

A Well, yes, it's maintained and greatly exceeded the AAA requirements.

[461]

Q Do you have any information on how the District has exceeded AAA requirements?

A Yes, I do. I asked our staff to prepare some information, to gather the data, and really in AAA, it's just gathering numbers, quite frankly, so we gathered some information that speak to each of the requirements in the order, the resources and the various personnel standards that the Court set forth.

Q All right. Can you describe some of the ways in which the Kansas City, Missouri, School District has exceeded AAA standards for the various resources?

A Yes. Let me start with the resources in the libraries, and by the resources, again I have a copy here. I just want to read what I am referring to and then I'll only do that once. Resources that are there in the library that are on the shelf the kids can use are comprised of books, periodicals, newspapers, audio-visual equipment of all kinds, and slides, prints and charts, maps, globes, various kinds of record players and listening devices, and certainly professional material. So those are the kinds of resources that are a part of the AAA requirements.

The Kansas City School District is in a fortunate position because all of their libraries meet or exceed AAA standards for resources, and some of the libraries exceed by a great deal. For example, the Knotts Environmental Science **[462]** exceeds the numbers of these things that are required - by numbers I mean there's a number of books that are required. They exceed the numbers by 2,874, most of which are books. They have 2400 more books. The Southeast Senior High exceeds the numbers of resources by 10,213. Troost Academy exceeds the number of resources for AAA by over 3300.

Q Now, when you talk about number of resources, are you again talking about the books and the things that go on the shelves?

A Number of things that are on the shelf for the students to use, and I'm talking about numbers that exceed what is required even by AAA standards.

Q Now, Dr. Stewart, is every library in the Kansas City, Missouri, School District at a level of meeting or exceeding the AAA standards?

A Yes, every library.

Q All right. Dr. Stewart, do you have an opinion whether the attainment and maintenance of AAA status since the 1987-88 school year has enhanced the level of quality of the educational opportunities available to all students in the KCMSD?

A Yes.

Q What's that opinion?

A Well, by making these kinds of things available - that's the purpose of AAA, to enhance the opportunity for **[463]** students to have enriched resources in the library, to have reduced pupil-teacher ratios as far as counselors and librarians are concerned. By making these things available, the standard of opportunity is much higher after these programs were implemented than before.

Q And on what do you base your view, then, that the educational opportunity in the Kansas City, Missouri, School District has been enhanced by the attainment of AAA status? In other words - well, let me ask it this way. Were these resources, then, not available prior to the 1985-86 period of time?

A These resources were not available to this degree. The District was AA on these standards prior to the Court's order, and

now it certainly has met the AAA standard and far exceeds it. It has greatly enhanced resources.

Q Does your knowledge of the provision of educational services throughout the State of Missouri enable you to compare AAA resources among KCMSD and the suburban school districts surrounding the KCMSD?

A Yes. It's just a matter of gathering data.

Q With respect to AAA resources, how does KCMSD compare with the suburban districts surrounding it?

A I'll make a general statement on that and then I would like to get into some of the specifics.

Q All right.

[464]

A Kansas City School District exceeds what's available in all the suburban school districts in almost every area of classification that we looked at.

Q Is that because of the larger number of students in the KCMSD, or is that something different?

A No, it's meeting standards.

MS. BRANNAN: We would object at this time to this line. We had inquired of the State the areas in which their witnesses would testify. We were told that Dr. Stewart was expected to testify that the District's Year VIII programs have been fully implemented, there has been equal educational opportunity enhancement of educational opportunities available in the KCMSD. There was nothing represented to us about comparative analysis with the suburban districts. The facts that the State gave us as a basis for Dr. Stewart's testimony were scant or practically absent from that representation. We think he should be limited to talking about the KCMSD.

THE COURT: Well, part of the remedial plan was to make educational opportunities in the Kansas City School District equal to or in excess of the suburban districts. I think his testimony is probative.

Q (By Mr. Fields) The question was with respect to AAA resources, how does KCMSD compare with the suburban districts surrounding the KCMSD?

[465]

A Okay, and I think I gave a general statement about they certainly meet and exceed what is available in the suburban school districts in almost every level, and then I would like to go into some specifics on that to substantiate that statement.

Q All right.

A And the first specific I would use would be in the area of resources themselves, those things that are in the library on the shelf available for the children to use, and you asked this question earlier, and I'll reiterate that. Kansas City School District, every library meets or exceeds the AAA standards in terms of resources. In other words, they don't need any other items in their libraries.

Now, we looked at the libraries at the elementary and middle and senior high level so we can go on to say that they don't need any other materials or resources in any library at any level. None of the suburban school districts are in that position. None of the suburban school districts are such that they do not need additional resources at one or several of the levels.

For example, the Blue Springs School District needs $89,000, more than $89,000 worth of resources at the elementary level, $27,000 at the junior high level, and $20,000 at the high school level. The Independence School District needs more than $47,000 worth of resources at the **[466]** elementary level, a little

over $2,000 at the junior high, and over $29,000 at the senior high level. And the same could be said for North Kansas City, they need over $90,000 if you combine their levels. The same can be said for Liberty, they need over $50,000 and the same can be said for virtually every one of the suburban school districts. The only thing that's different is the amount of money. All the suburbans need additional resources in their libraries.

Q In some categories, are there suburban districts which are in a position where they don't need additional resources for discrete categories of the resource needs?

A Yes. It may be - well, for example, Lee's Summit does not need any additional resources in their elementary libraries, so that's taken care of, but they do need additional resources in their junior high libraries.

Q Okay. Now, you have dealt with library services. What about counseling, counselor services?

A Actually, I have just dealt with the resources. I would like to deal with the librarians because I think that's important also.

Q Okay.

A The Court also directed that the number of librarians be increased to meet or exceed the AAA standards. The AAA standards for librarians is a ratio, really. It's one librarian to a certain number of students, and it varies **[467]** depending upon the level. So it's one librarian to 1500 students at the elementary level and then 1,000 at the secondary, the junion [sic] high and the secondary level.

The Kansas City current ratio for librarians at the elementary level is 1 to 643 as compared to 1 to 1500. So they are more than twice what the AAA requirement would require for the number of librarians. In other words, one librarian serves 643 children instead of the AAA standard of one to 1500.

Q What about the junion [sic] high? Now, understand that KCMSD doesn't have junion [sic] highs anymore.

A Middle school, junior high. We don't vacillate back and forth between the terms because each district has a different kind of term, but anyhow, the junior high age grouping, the requirement is 1 to 1,000 and Kansas City has 1 to 642. In the senior high, the requirement is 1 to 1,000 and Kansas City currently has one librarian for every 819 children. So they meet and in all cases exceed, but in some cases greatly exceed the load on the librarians for the pupil-teacher ratio.

Q Now, what about the suburban districts surrounding KCMSD?

A Here what the picture will show is that the ratio that's available in the Kansas City School District greatly - greatly exceeds what's available in the suburban school **[468]** districts in almost all cases. Now, not every case. For example, Fort Osage has a more advantageous ratio. It has 1 in 405, but from that point on, the suburban school districts are much larger. Lee's Summit has 1 to 1,000 at the elementary level. Raytown has 1 to 1900, almost 2,000. Independence, 1 to 1400. Liberty, 1 to 1500. That's at the elementary level, and the same kind of data is available and reflected for the other levels.

As a matter of fact, at the junior high level there's only two school districts that have a lower librarian ratio than does Kansas City, and conversely, then, all of the suburban school districts, except for those two, except for Grandview and Center, have much higher ratios, much less advantageous ratios at the junior high level. And then the same kind of information at the senior high level. Virtually half of the senior high districts - suburban districts in senior highs have ratios that are much higher than Kansas City in librarians.

Q Does that complete your discussion of the library service and resources?

A That's the resources and the librarians, yes.

Q How about counseling services?

A The same kind of analysis was conducted there and the standard is the number of counselors to the number of pupils, one counselor will serve a certain number of pupils. The **[469]** ratio for AAA requirements are 1 to 1500 at the elementary level, and 1 to 390 at the junior high or middle school level, and then 1 to 390 at the high school level.

Kansas City School District currently at the elementary level has one counselor for every 786 students as compared to the requirement of one to every 1500. So again, almost twice as good as the AAA standard. The junior high and high school standards, the Kansas City ratio is 1 to 352 at the junior high or middle school, and 1 to 279 at the high school level for counselors. And then the data for the suburban school districts is reflected and that is a better ratio than exists in almost all of the suburban districts. There are exceptions at each level, elementary and middle school and in the high school.

Q Can you give me a relative percentage of how many of the suburban districts might have superior resources?

A At the elementary level, the Kansas City ratio is 1 to 786, Fort Osage is 785, so there's one less. Lee's Summit, 719. Hickman Mills is 1,005. Independence is 781. Center 771. Liberty is 231. So they are right in the range of most, exceed some.

At the secondary level, the junior high, Kansas City is at 352 and there's only a few suburban districts that have a better ratio than that. For the most part, the suburban districts do not have a better ratio than that, and **[470]** the same for the high school, the ratio of 1 in 279 at the high school level is better than eight of the suburban school districts.

Q What about art, music and PE?

A The same kind of analysis was conducted there, ratio of how many pupils to the art teacher and how many pupils to the music teacher and PE teacher. Kansas City ratios, I could give the 1 to 400 for art and music and 351 for PE, but those numbers are probably not all that important. In terms of comparability to the suburban school districts, the art, music, and PE ratios for the Kansas City School District are better than any of the other suburban school districts in all the categories, art, music, and PE. They all have higher ratios in those areas.

Q Okay. Dr. Stewart, I'd like to move now to reduced class size. What is your understanding of the educational requirements of the Court for reduced class size?

A The Court wanted to establish maximum class sizes at the various levels to increase the attention that was - for instruction and the opportunity for improvement and the maximum class sizes were K through 3 at 22, and grades 4 through 6 at 27, and then the secondary level, it was maximum load per teacher of 125 students per teacher.

Q To your knowledge, have those class sizes been attained by the KCMSD?

[471]

A Yes, they were fully attained in the '88-89 school year, and recognized by this Court in its July '89 order.

Q Okay. Prior to the Court's remedial order of June 14, 1985, were the class sizes in those grade groupings in KCMSD higher than the Court's requirement?

A Yes, they were higher, and in some cases significantly higher.

Q Okay. Have the reduced class sizes attained in the '88-89 school year been maintained since that time?

A Yes, they have. I think in all cases except for apparently two. The Court has allowed for two small exceptions, I think effective just this year.

Q Okay. And did that have to do with a very small number of students?

A It's my understanding, yes.

Q In your opinion, has the attainment and maintenance of the reduced class size goals of this remedy since the 1988-89 school year enhanced the level of quality of educational opportunities available to all students in the KCMSD?

A Yes. That's one of the primary things that our department has spoken to for years is increasing the individual attention that's available by a limited number of students in the class, by reducing class size. By reducing the class size, as the Court has done, the Court has assured that the opportunity for increased attention is available in **[472]** absolutely every class in the School District, except for those two exceptions, at every grade level, so the opportunity for increased individual attention to instruction has been assured in every school, every building, every grade, every class.

Q Dr. Stewart, do you also believe that by establishing reduced class sizes, the opportunity for desegregative educational opportunities has been provided and maintained since that time?

A Yes. The opportunity has been there for the years that the program has been in place.

Q How do the class size maximums that are available in KCMSD compare with the class sizes in the suburban districts surrounding KCMSD?

A There, too, I asked the staff to gather the numbers and it was a job of our school data section, which is simply just gathering

numbers of students. We have available to us - I'll preface my remarks by saying this. We have available to us the class loads of every school district, of every class in Missouri, so it's really just a simple gathering of information to analyze and present the information that I have here.

The first thing that we looked at was the grades K through 3, because the Court established a class size of 22, maximum 22. There are no school districts of which I am**[473]** aware, and I don't believe there are any, that have maximum class size loads or requirements of no greater than 22 at this grade level. School districts adhere to standards in classification, either AA or AAA, which are certainly higher than the 22. So we looked at and we divided the class sizes for those that are available at 22 or fewer students and those that are available in the District that have more than - 23 or more students and tried to take a look at that.

In the suburban school districts, the picture is kind of what you might imagine. In all the suburban school districts, there are classes that have no more than 22 students in them, in all the school districts in grades K through 3, but also as you might imagine, there are literally hundreds of classes in the suburban school districts that have more than 23 students at this grade level. For example, Fort Osage has thirty-five classes that serve 855 children of more than 23 in a class. Blue Springs has a hundred classes at this grade level that serve more than - 23 or more students. Lee's Summit has seventy-five such classrooms, Hickman twenty-two, Raytown has a hundred such classrooms, Independence has ninety-four classrooms, North Kansas City ninety-nine. Liberty fifty-one. Park Hill fifty-two. So there's the existence in the suburbans of a great many classrooms serving thousands of students, really, if we were to add all this up, of classes that greatly exceed **[474]** the maximum class sizes that are available here.

Q Is that data for the suburban school districts, is that this year's data?

A That's this year's data, yes. And we do the same kind of comparison for grades 4 through 6, and the only thing that changed there, of course, was the numbers. The maximum class sizes ordered by the Court were 27, so we looked at classes of 27 or fewer and then we looked to see the number of classes that are 28 or more. And the same kind of data. I won't bother to go through the numbers, but every suburban school district does have some classes that are 27 or fewer students. All of the suburban school districts, except for two, except for Liberty and Park Hill, all of the suburban school districts have several classes that exceed the 27 ratio, that have more than 28. So the same kind of analysis. On the comparability question, or standard, what's available in the Kansas City School District at this level, grades 4 through 6 greatly exceeds what would be comparable in the suburban school districts.

Q How about the grades 9 through 12?

A The 9 through 12 we had a little different kind of analysis because the Court established a maximum class load per teacher, 125, so we just simply asked the question what's the average class load in the Kansas City School District at this level, at the secondary level, and what's the average **[475]** class load of the secondary teachers in the other school districts. And again, using this year's data, the average class load in Kansas City School District in the secondary level, grades 9 through 12, is 85.2, so it's significantly below the 125 cap, maximum cap.

The average class size per - let me rephrase that, it's not class size, the average teacher load in the other school districts, in Fort Osage it's 159, Blue Springs it's 161, Lee's Summit it's 116, Hickman Mills, 134, Raytown 120, Grandview 136, Independence 132, and Center 112.

Q Now, let me ask -

A So in summary, it's - in three districts, it's below that cap of 125, but in no districts is it below what's actually - the average that was actually going on in the Kansas City School District of 85.2.

Q Let's move to full day kindergarten. What's your understanding of the Court's educational requirements for full day kindergarten?

A The full day kindergarten program was to expand a very limited program that existed at the time and offer full day kindergarten to more students, available to all students.

Q Now, when you say it was a limited program, are you saying there was some full day kindergarten available in KCMSD at the time?

A Yes, I believe it was primarily Chapter 1 funded at the **[476]** time.

Q And we are talking about the 1985-86 time frame?

A Yes. So it was to expand the program and offer to make it available to all students, not just students that happened to be what we would call Chapter 1 eligible, in other words, have certain kinds of remedial needs, so it was to expand the program, make it available to all the kindergarten age children.

Q What did the Court require in order to do that?

A The requirement was, through some extensive calculations, that the District would need 39 additional kindergarten teachers at that time in order to make this program available to the enrollment at the time.

Q Okay. And when did this program become fully available to the District?

A Again, that was in 1985-86 school year.

Q Has that program been maintained continuously since then?

A Yes, it has.

Q And you have already indicated that there was a small availability of some full day kindergarten programs through Chapter 1 prior to that?

A Right.

Q Okay. Do you know when the reported full day kindergarten enrollment was in 1985-86?

[477]

A It was to be 3,281.

Q Okay. And what is the reported full day kindergarten enrollment in the current school year?

A 3,293, so an increase of twelve.

Q Okay. And how many more full day kindergarten teachers have been added in total since 1985-86?

A The number has gone up from 39 up to 76, so it would be an increase of 37 kindergarten teachers.

Q Over and above the 39 that were originally -

A Over and above the 39.

Q In your opinion, has the District-wide availability of full day kindergarten beginning with the 1985-86 school year enhanced the previous level of quality of the educational opportunities available within KCMSD to all students who want it?

A Yes. The reason I say that is that prior to the Court's order it was available only to a limited number of students and actually students that were, as I said Chapter 1, eligible. In other words,

they had certain kinds of problems that needed to be remediated. The Court's order made the program available to all students at that age level.

Q Okay. In terms of the availability of full day kindergarten programs, how does KCMSD compare with the school districts throughout the rest of the state?

A There are 173 AAA classified school districts in **[478]** Missouri out of 540 that offer a full day kindergarten program. Most of those are predominantly again Chapter 1 funded and service a specific kind of student, so it is available in the state in 173 school districts. There are - let me go on. There are really 288 full day kindergarten programs, but then the others are in AA classified schools and some of them are in unclassified schools. They are not classified at all.

Q All right. And what would be the difference in the program from a AA school to a AAA school?

A Again, it would be - the difference in this particular kind of program I think would be the kind of children that are served, more so than the classification as such. The kind of children that are served would be more Chapter 1 eligible types of children.

Q What are Chapter 1 eligible children, generally?

A Generally they are children that have educational deprivation that's probably caused by some economic deprivation, also, and it would result in the need for remedial reading kinds of programs.

Q Okay. Do you know whether any of the school districts, suburban school districts surrounding the KCMSD on the Missouri side, offer a full day kindergarten?

A We know that none of the suburban Kansas City school districts offer a full day kindergarten program. They all **[479]** offer half day kindergarten programs.

Q Okay. I want to move now to extended day programs. What's your understanding of the Court's educational requirement for the extended day programs?

A The extended day program really started out as the before and after school tutoring program and that really was the intent. It was to provide an opportunity for increased instructional time either before school or after school, provide an opportunity for parents perhaps to leave their children off and receive a little additional instruction time in the morning, or maybe to leave the children there at school a little longer in the afternoon to receive a little additional instruction. And it was started originally in ten schools.

Q And what was the program originally called?

A Before and after school tutoring.

Q When was the program established as an operational program?

A That, too, was one of the 1985-86 programs.

Q And has it continued continuously since that time?

A Yes, it has. It has continued, although not in the ten schools. It's down to six schools. It's available now I believe in six schools.

Q Now, we are talking about the traditional non-magnet schools?

[480]

A Yes, traditional, not the magnet.

Q Is the program also available in magnet schools?

A Yes, it is.

Q Did the program exist in the KCMSD prior to the 1985-86 school year?

A I don't believe it did. I don't believe it existed, but if it did exist, it was certainly limited and not to the - didn't have the curriculum and the offering and the scope that it has in this sense, the opportunity that we're providing here for cross-age tutoring and peer tutoring and parental involvement. I wouldn't want to say there wasn't some extended learning time, but very little.

Q In your opinion, Dr. Stewart, has the continuous existence of the extended day program beginning in the 1985-86 school year enhanced the level of quality of the educational opportunity for students in the Kansas City, Missouri School District?

A Yes.

Q In what facets?

A Well, again by making the program available and it's been consistently available, and available to about a thousand students that participate in it. You are offering an extended learning time for that group of students to improve the student achievement. It's an opportunity for those children to improve their academic performance, and **[481]** it's been available to - to whoever.

Q And has it also provided working parents, both minority and non-minority parents, a place to leave their children both before and after school?

A Yes, it has.

Q Has that been offered continuously?

A To my understanding, yes, it has.

Q And has the existence of the program made available on a continuous basis the opportunity for retention and attraction of non-minority students?

A Yes. The opportunity provided by this program has been there for both - the attraction to minority and the non-minority involvement and the opportunity for improved instruction.

Q Now, Dr. Stewart, does DESE collect data on the availability of extended day programs throughout the State?

A Well, we have not in the past.

Q Why is that?

A We are beginning to do that, and actually this is the first year. Well, these are relatively new programs throughout the state. They have not been in existence throughout the state, the extended learning time and the extended day kinds of programs, so we're beginning, and this is the first year that we are beginning to gather data on this kind of program.

[482]

Q Dr. Stewart, I'd like to move now to summer school. What's your understanding of the educational requirement for summer school of the Court?

A Well, again, it's an extended learning kind of program. Instead of before and after school, though, it's in the summer and it was designed or intended to provide remedial, developmental, and some enrichment programs for the students in grades K through 12.

Q Did that requirement vary by level?

A Yes, it did.

Q What did it require for elementary?

A Well, I think that the elementary were mostly the remedial, and developmental and enrichment was at the secondary level.

Q Okay. When was the summer school component of the desegregation plan first fully operational?

A This is again one of the '85-86 programs. It was the summer of '85, actually.

Q And has it remained in operation each and every summer session since that time?

A Yes, it has.

Q Will it be operating this summer?

A I'm sure it will be.

Q Was summer school offered in the KCMSD prior to the 1985 school year?

[483]

A Yes, it was, but again, it was a limited offering. There is some state funding available for this program so it was offered.

Q Do you know how many sites summer school is offered at in the KCMSD?

A Kansas City currently is offering this program in nine school buildings, grades K through 12.

Q Okay. And in your opinion, has the operation of the summer school program provided an opportunity for students in the KCMSD to obtain an enhanced level of quality of education?

A Yes, it has. What has occurred is the number of children that are participating has increased significantly and the number of sites where the children can go has increased and the kinds of programs that the summer school offers has increased because of the Court's order.

Q How does KCMSD compare with the surrounding suburban districts in terms of the summer school programs offered?

A The kind of analysis that we did there is we took a look at the percentage of students that participate in summer schools. It wouldn't work to just look at the numbers because the numbers of children in the various districts differ. The percentage of children that participate in the Kansas City School District is 1.71 percent, and that sounds small but really it's not if you understand the summer school **[484]** program. That percentage of the children that participate is greater than any of the other suburban percentage rates or participation rates in this area for summer school, and greatly different that what goes on statewide on an average.

Q Now, have you made some specific comparisons with some of the suburban districts?

A Yes.

Q Could you give the Court an idea of the comparison.

A Again, we are dealing with percentages. The Fort Osage School District has less than one percent, actually it's .70 percent. Blue Springs is the only one that's really relatively close to the Kansas City School District. It has 1.16 percent of its children participate in the summer school program. Lee's Summit has 1.13. Hickman Mills 1.08. Raytown less than one half of one percent. Grandview considerably less than one half of one percent, .31. Independence has 1.34 percent. Center is one percent. North Kansas City 1.33, and Liberty is less than one half of one percent and Park Hill is just a little over one half of one percent. So the percentages are significantly lower than the percentages or the number of children that participate in the Kansas City School District.

Q And relative to a comparison of the suburban districts and KCMSD, your conclusion from those numerical comparisons is what?

[485]

A The opportunity for summer school in the Kansas City School District is greatly enhanced and it's much more widely available in Kansas City, the nine sites, as compared to the suburban school districts, and more - a higher percentage of the Kansas City school children participate in summer school than in any of the other suburban school districts.

Q Okay. Moving to early childhood education, what's your understanding of the Court's educational requirement for that program?

A That program, the Court directed that the District and state get together and implement the state's early childhood education program.

Q Did it also have a language component?

A Yes, the District asked and the Court agreed to include a language development component in that program.

Q And whose idea was that?

A That was the District's.

Q Okay. And that was included?

A Yes.

Q Do you know when the early childhood education program began fully operating?

A That was in the 1986-87 school year when that program was implemented.

Q To your knowledge, has the program operated continuously ever since?

[486]

A Yes, it has.

Q And does the Department of Elementary and Secondary Education work on a continuing basis on this program?

A We have continued to work with the District. I think the negotiations have kind of wound down a little bit. It seems to be an established kind of program.

Q Okay. In your opinion, has the continuous availability of this program enhanced the quality of educational opportunity in the KCMSD?

A Yes, it has.

Q And how has it done that?

A Well, the program offers a couple of services. It offers screening services to children ages, I think it's birth through four, and it offers services to families, families of children who are in ages in zero to two, birth to two, and then another kind of services to families who have children ages three and four. So it has provided the additional funding and made available more services to the children, more services to the family.

Q And at your instruction and under your supervision, has the Department collected some data relating to the early childhood education program?

A Yes, we have.

Q What does that data reveal?

A The question I asked of our supervisors in our early [487] childhood program was really I wanted to know how many parents as teachers, educators, the Kansas City School District had and I wanted to know also what was their load, how many

families did they serve, and how that compared with what was available in the suburban school districts.

Kansas City currently for this year has 92 full time parent educators that provide these kinds of screening services and provide the kinds of services to families, and their load per parent educator is one parent educator to 32 families. And then I wanted to know how that compared to what was available in the suburban school districts, the 92 full time and the 1 to 32 load. All the other suburban school districts offer this program. They have a mixture, whether or not they are parent educator or full time or part-time. Some are each, they have a couple of each. But as far as the number of educators, the Kansas City School District has more parent educators than the Fort Osage, Lee's Summit, Raytown, Grandview, Center, Liberty, Park Hill, Independence, and Blue Springs School Districts put together.

Q You're not talking about more than each one individually.

A No, I'm talking about put together. So it's a greatly enhanced Early Childhood Program and it would certainly far exceed what would be available in the suburban school districts.

[488]

The second part of that question is well, what's their load, what's their load for the parent educators. In the Kansas City School District, each parent educator works with about 32 families and that is the lowest load per parent educator of all the suburban school districts. Some of them work with as high as fifty and a hundred families to one parent educator. And I could recite that date.

Q Well, we won't go through the list again. Is there any other factor that gives you an indication that the program has been fully implemented since the 1986-87 school year?

A This is one of the programs that the - that has been expanded. I think it's gone through two expansions and I think that the logic for the expansion was that it was implemented and it was successful and the two expansions, I believe there was one in '87 and another one in '91, so that tells me the program is implemented and successful and therefore, expanded.

Q Let's move now to the '86-87 magnets. What's your understanding of the Court's requirement for that initial set of magnet schools?

A Kind of generally to assist in the desegregative and educational experiences that would be available to the Kansas City, Missouri, School District and to become also a part of the Court's effort to improve the student achievement, District-wide student achievement.

[489]

Q Was there also an application to reduce class size component?

A There was also that.

Q And the Court required that?

A Yes.

Q When was this set of magnets first operational?

A These are known as the '86-87 magnets so that was the year they were implemented.

Q Did these magnets actually exist prior to that?

A The schools in the magnets to some degree existed prior to that, yes. The source of funding was enhanced by the order, but the schools were there and the themes were generally there. They were referred to then I believe as clusters.

Q Okay. And has this program been available continuously since the '86-87 school year?

A Yes, it has.

Q In your opinion, has the continuous operation of these magnet schools from that time up to the present enhanced the level of quality of the educational opportunities available to students attending KCMSD?

A Yes, again by the enhanced resources, those programs have increased the opportunities for improved student achievement for the students who go to those schools.

Q Now, how does the KCMSD compare with the suburban school **[490]** districts in terms of this particular enhanced educational offer?

A Well, I think most people know the suburban school districts do not have school buildings that have specific focuses as do the magnets, so there's really no comparison. They just exceed what is available to the suburban school districts by having the magnet schools, the magnet programs.

Q Now, do you know whether or not KCMSD itself has indicated a view of the level of implementation of success of these particular magnets?

A Yes, that's part of the evaluations that the District has done in the normal course of their business, and in some of the readings I think they have referred to the magnets as mature and successful and basically meeting the District's 60-40 goals the District has established.

Q All right. Let's move now to the effective schools program, Dr. Stewart. What's your understanding of the Court's requirement for the effective schools component?

A The effective schools component was really designed or intended to provide enriched resources specifically to focus on improving student achievement and raising test scores by measuring and using a couple of tests, really, and to identify the kinds of programs that would do that at the local level, at the school building level, by involving parents in the community and the teachers. So identifying **[491]** programs that were designed specifically to improve student achievement.

Q Were there any ratio requirements in terms of how the money was allocated?

A Yes. There was really two sides to that. The school districts that had -

Q School districts?

A School buildings, I'm sorry, that had a 90 percent or more minority enrollment received a higher allotment from the Court than the school districts that were below 90 percent. I believe there were twenty-five schools in the 90 percent or more and forty-three schools in the other ratio balances.

Q Dr. Stewart, when was the program implemented?

A Again, that was a 1985-86 program.

Q And has the program been available continuously since that time?

A Yes.

Q And has the availability of that program enhanced the quality of educational opportunity in the KCMSD over the quality that was available before that school year?

A Yes.

Q And how is that?

A Well, here again, what the Court allowed or provided was additional money for each school that were high in minority concentrations, twenty-five schools an additional amount of **[492]** money and for the other forty-three schools, a slightly less amount of money, but for each school there was monies that were specifically targeted to do certain things, a very limited number of certain things. And so when you take a look at the opportunity that's provided by the additional monies and then the opportunity that's multiplied by the number of years those additional monies were available, I'd have to conclude that the opportunity to improve student achievement existed.

Q And has the availability of the program also enhanced the opportunity to increase the amount of desegregation within the school district?

A The opportunity was there.

Q All right. Is such a program available in the surrounding suburban school districts?

A No.

Q Is there funding available for a program like this from the State?

A No. There's no funding available for these kinds of programs.

Q Okay. Have you reviewed the KCMSD August 1991 evaluation of the effective schools program relative to the effectiveness of that program?

A Yes, I did.

Q What did that evaluation do?

[493]

A Generally - not generally, but what they said, the program was not successful in meeting the objectives, math and reading objectives. As a matter of fact, it was only 17 percent of the buildings met I believe it was the reading objectives and only about 30 percent of the buildings met the math objectives. So a very low rating on meeting the objectives.

Q In light of that, do you still hold to the view you expressed just a moment ago relating to the improved quality of the educational opportunity provided by this program?

A Yes. The report didn't say why the results were what they are so I really don't know why the results were that way, but the opportunity and the enriched resources were available for - since 1985-86 and the opportunity was available in each school, so we're not just saying it was a limited opportunity. It was available in each school for an extended period of time to improve student achievement. The opportunity was there.

Q Thank you. Now, Dr. Stewart, I want to ask you about an issue which the District has raised in its pleadings. If the Court were to adopt the State's view and declare that these programs are unitary and are eligible for a decrease in the desegregative funding that has been provided, what do you believe would happen to those programs?

A Well, the purpose of my testimony is not to say to end [494] the programs. That's not the purpose. And I may elaborate on that later, I don't know, but that's not what I'm saying. The question of what will happen to the programs, that becomes an issue for the District to resolve. And I have to believe that the District knows that the ongoing supervision, or the supervision will not go on forever, that there will come a time when the District is making plans for the takeover of the various programs. I think that's probably the prudent thing to do. I guess I don't

really know that that's occurring. But I would have to believe that the prudent thing to do for the District would be to make plans for the future when they can take over the programs.

Similarly, I'd have to believe that the District would plan to continue those programs that helped elevate itself, the programs that helped it achieve AAA, the programs that helped it achieve comparability that is greater than what is available in the suburban school districts. So I think that the District has to plan for those kinds of things, and I'm assuming that they are doing that.

And I think a third component of that, and a component that is obvious in every school district, is that the District has to plan for the support of the community and continue to support a greatly enhanced and upgraded school system.

Q Do you believe that the patrons of the Kansas City, [495] Missouri, School District will continue to support those systems if asked to do so?

A The patrons of the St. Louis School District are doing that, and -

Q What's your evidence that the patrons in St. Louis are supporting the programs there?

A Well, essentially it comes down to voting for tax issues and making sure that the monies are there to do things. Every school district in Missouri is facing financial problems, but I think that's a secondary issue to this.

Q Was there a recent levy election in St. Louis?

A Yes.

Q What was the result of that election?

A Oh, Mr. Fields, you are catching me off guard here. It was a successful election, but I don't know -

Q Did that election increase the funding for the school district?

A Yes.

Q Okay.

A But the patrons in every school district have that same choice and option and opportunity, and I guess I would have to believe that the District and the patrons can work together to maintain an enhanced school system once the Court has seen to it that it has been established.

Q Now, is the State's position one that you believe takes **[496]** into account this concern with the reaction of the patrons and the continued support necessary to maintain these programs after funding from the desegregation case is cut off?

A You're going to have to repeat that one for me.

Q Does the State's position take into account the concern with the continued support of the patrons?

A I see. Yes. I made the statement that I assumed the District was making plans, and that may not be right. So what the State has said in its motion, that if the Court determines that the plans have been implemented and met the goals that have been established as far as comparability and meeting AAA standards, but if the District is perhaps not as ready as we think that it should be to take over, then they could phase that responsibility back into the District over a two- or three-year period.

Q Now, Dr. Stewart, do you agree with the premise that each of the programs about which you have testified today is a part of a one - a whole program which has to be looked at as a whole program, each part being completely interdependent on all the other parts, such as that court supervision and control could not - for discrete components of that programs could not be terminated?

A No, I do not.

Q Do you believe that each of the components of the Year **[497]** VIII budget could be measured against the provision of an equal opportunity within the KCMSD?

A I believe that they are distinct and separate components. They are - originally they were a part of a plan to upgrade the system, to upgrade it in terms of AAA standards and classification standards, and to upgrade it in terms of comparability to the suburban school districts, to make it equal to or above the average of what would be available in the average suburban school districts. There was no talk that I can recall, from sitting in and listening to the various discussions and debates and reading the motions, that this component, these components and what is in the Intra-District plan to upgrade and improve student achievement, there was no talk then that these components formed the basis or the floor for something to come along in the future, for example, the magnet, or even the capital improvements program. These programs were designed in intra-district to upgrade the system in terms of AAA, improve student achievement, improve opportunity for desegregation attractiveness and comparability, and they stand alone. And actually, when you think about it, take the early childhood program and the early childhood program with what its goals and purposes are and it's not really very closely connected to the goals and purposes of a summer school program and the two are not connected and one doesn't stand or fall with what **[498]** happens on the other one, and I think the other programs are similar to that.

Q Okay. Dr. Stewart, do you agree with the premise that the individual components of the remedy about which you have testified can't be considered fully implemented until the District's own internal guidelines of a district-wide 60-40 ratio and meeting the national norms for achievement testing have been met?

A No, I don't believe that, either.

Q Why not?

A Well, there's two parts to that. One has to do with the 60-40 ratio, and it's my understanding that that's a ratio the District deems to be desirable or attractive or would like to have. It's not a ratio that has been identified for these components, for racial balance or for desegregative attractiveness. As we have been working on implementing these components and monitoring the progress, we view that the goal of these components was to increase the opportunities for student achievement, improved student achievement, to enhance the potential for desegregative educational experiences and to enhance the likelihood of desegregative educational experiences by the rulings that come out of the Court order, but we didn't see in there any particular kind of specific racial balance that was established by the Court. A 60-40 racial balance seems to be **[499]** very impractical and I would venture to say not at all achievable. But even setting that aside, it was not a goal that was available or was identified for these particular programs.

Now, the other part of that question has to do with the testing, or the student achievement up to a certain level. I'm not aware that that level was established prior to the Year VIII budget hearing where the students would achieve at the 50 percentile of what's going on in the nation, the norm for the nation, 50 percentile, and I'm not exactly sure what the District means by that. Probably have to look into that. But if the District means the 50 percentile for every subject matter for the District, for probably every grade level, I would assume every grade level and every subject mater, that would be an extraordinarily difficult, almost virtually impossible goal to achieve. National norms are established by using national data. Test norms are established by using data from students all over this country, big schools, small schools, rural schools, urban, metropolitan, just the whole gamut of schools. It would be virtually impossible for a school district, any school district, or in this case the Kansas

City School District, to be reflective of the nation as a whole. It would be an unachievable goal.

MR. FIELDS: Thank you, Doctor. **[500]** No further questions, Your Honor.

* * *

APPENDIX X

Excerpts from Cross-Examination of Dr. Terrance Stewart (May 28, 1992)

* * *

[525]

* * *

THE COURT: Let me put some of this to rest. The Court's goal was to integrate the Kansas City, Missouri, School District to the maximum degree possible, and all these other matters were elements to be used to try to integrate the Kansas City, Missouri, schools so the goal is integration. That's the goal. And a high standard of quality education. The magnet schools, the summer school program and all these programs are tied to that goal, and until such time as that goal has been reached, then we have not reached the goal. But when Dr. Stewart says no particular goal has been set, I think he's in error. The goal is to integrate the Kansas City, Missouri, School district. So I think we are wasting our time. We are not wasting our time when we're talking about certain segments of the goal having been fully implemented, but to me it indicates some degree of success, providing that we were correct in setting out on a program in the first place for [526] the purpose of integrating the Kansas City, Missouri, School District. Now, that's the goal. If the Kansas City, Missouri School District had not been segregated, the case would not have been here in the first place. It's no constitutional violation to not provide quality free education. If that had been the issue, we wouldn't be here. If so if that gets rid of some of the exchange and arguments -

MR. BENSON: Judge, I agree but with one bit of explanation. The Court also found that as a result of the prior segregation the School District suffered an inferior education, and under the Milliken 2, it had -

THE COURT: That's part of the vestiges and that's part of the reason that we're striving to integrate.

* * *

[531]

* * *

Q Dr. Stewart, do you, testifying on behalf of the State as to its position about opportunity, do you have an opinion as to whether or not the educational deficits that you acknowledged were vestiges of the prior segregation have been eliminated to the extent practicable in the Kansas City School District?

A No, that's not the purpose of my testimony, Mr. Benson.

[532]

Q You have no opinion in that regard?

A That's not the purpose of my testimony.

Q Do you have an opinion in that regard?

A It's not the purpose of my testimony.

* * *

COMPARISON OF KCMSD TEACHERS' SALARIES WITH AVERAGE URBAN TEACHERS' SALARIES IF DESEGREGATION FUNDING FOR SALARIES CEASES

MINIMUM SALARIES FOR TEACHERS WITH BACHELOR'S DEGREES

Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	17,000	18,345	1,345	7.9%
1987-88	18,000	19,270	1,270	7.1%
1988-89	18,000	20,270	2,270	12.6%
1989-90	18,200	21,395	3,195	17.6%
1990-91	22,215	22,465	250	1.1%
1991-92	22,215	23,130	915	4.1%
1992-93 (Proj.)	17,000	24,055	7,055	41.5%

MAXIMUM SALARIES FOR TEACHERS WITH BACHELOR'S DEGREES

Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	23,388	28,425	5,037	21.5%
1987-88	25,560	29,910	4,350	17.0%
1988-89	25,560	31,390	5,830	22.8%
1989-90	25,844	34,145	8,301	32.1%
1990-91	31,545	35,980	4,435	14.1%
1991-92	31,545	36,645	5,100	16.2%
1992-93 (Proj.)	23,388	38,111	14,723	63.0%

Note: KCMSD salaries for 1991-92 assume no increase from previous year.
KCMSD salaries for 1992-93 assume no extension of the salary order.
Urban average salaries for 1992-93 are projected assuming a
4 percent increase from the previous year.

COMPARISON OF KCMSD TEACHERS' SALARIES WITH AVERAGE URBAN TEACHERS' SALARIES IF KCMSD'S PROPOSAL IS ADOPTED BY THE COURT

MINIMUM SALARIES FOR TEACHERS WITH BACHELOR'S DEGREES

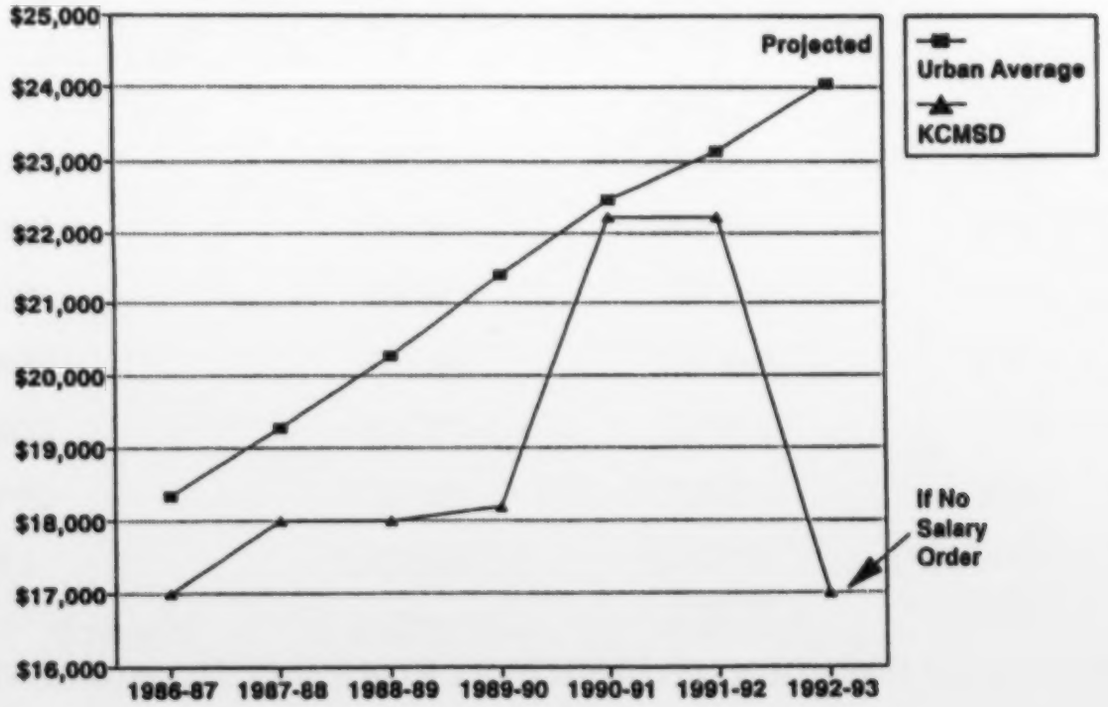
Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	17,000	18,345	1,345	7.9%
1987-88	18,000	19,270	1,270	7.1%
1988-89	18,000	20,270	2,270	12.6%
1989-90	18,200	21,395	3,195	17.6%
1990-91	22,215	22,465	250	1.1%
1991-92	22,215	23,130	915	4.1%
1992-93 (Proj.)	22,215	24,055	1,840	8.3%

MAXIMUM SALARIES FOR TEACHERS WITH BACHELOR'S DEGREES

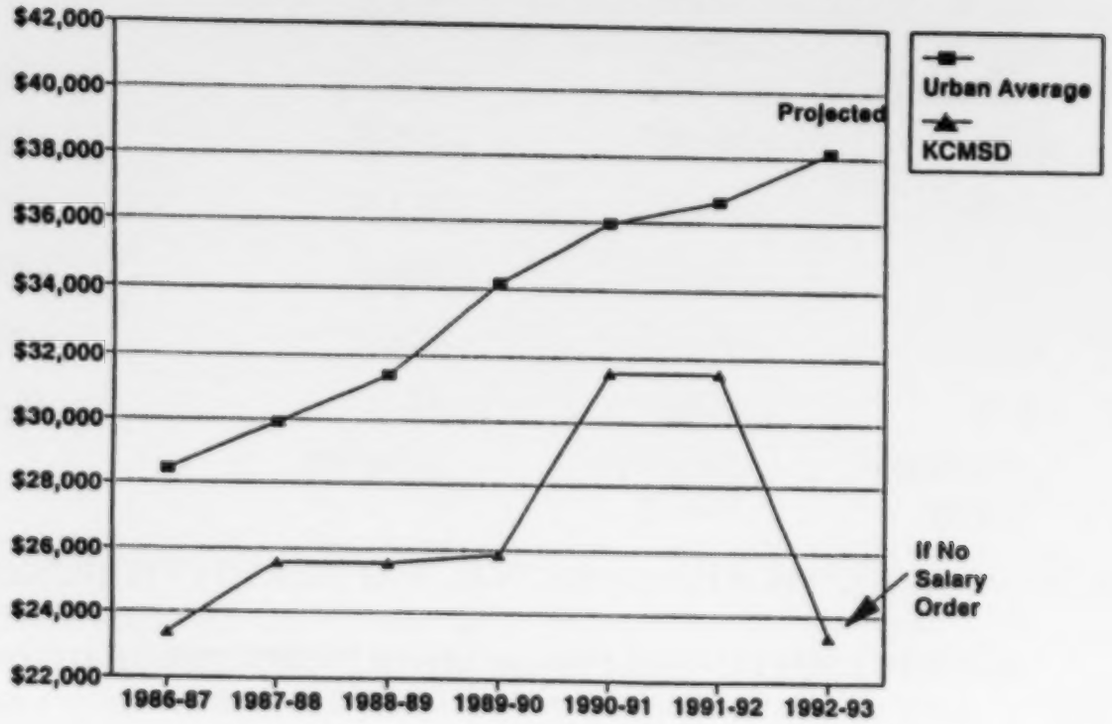
Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	23,388	28,425	5,037	21.5%
1987-88	25,560	29,910	4,350	17.0%
1988-89	25,560	31,390	5,830	22.8%
1989-90	25,844	34,145	8,301	32.1%
1990-91	31,545	35,980	4,435	14.1%
1991-92	31,545	36,645	5,100	16.2%
1992-93 (Proj.)	31,545	38,111	6,566	20.8%

Note: KCMSD salaries for 1991-92 assume no increase from previous year.
KCMSD salaries for 1992-93 assume adoption of KCMSD's proposal.
Urban average salaries for 1992-93 are projected assuming a
4 percent increase from the previous year.

Minimum Salaries for Teachers with B.A. Degrees
National Urban Average Compared with KCMSD



Maximum Salaries for Teachers with B.A. Degrees
National Urban Average Compared with KCMSD



COMPARISON OF KCMSD TEACHERS' SALARIES WITH AVERAGE URBAN TEACHERS' SALARIES IF DESEGREGATION FUNDING FOR SALARIES CEASES

MINIMUM SALARIES FOR TEACHERS WITH MASTER'S DEGREES

Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	17,754	19,670	1,916	10.8%
1987-88	19,890	20,640	750	3.8%
1988-89	19,890	22,385	2,495	12.5%
1989-90	20,111	23,570	3,459	17.2%
1990-91	24,548	24,760	212	0.9%
1991-92	24,548	25,515	967	3.9%
1992-93 (Proj.)	17,754	26,536	8,782	49.5%

MAXIMUM SALARIES FOR TEACHERS WITH MASTERS'S DEGREES

Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	27,744	32,630	4,886	17.6%
1987-88	30,510	34,240	3,730	12.2%
1988-89	30,510	35,825	5,315	17.4%
1989-90	30,849	38,870	8,021	26.0%
1990-91	37,654	40,910	3,256	8.6%
1991-92	37,654	41,920	4,266	11.3%
1992-93 (Proj.)	27,744	43,597	15,853	57.1%

Note: KCMSD salaries for 1991-92 assume no increase from previous year.
KCMSD salaries for 1992-93 assume no extension of the salary order.
Urban average salaries for 1992-93 are projected assuming a
4 percent increase from the previous year.

COMPARISON OF KCMSD TEACHERS' SALARIES WITH AVERAGE URBAN TEACHERS' SALARIES IF KCMSD'S PROPOSAL IS ADOPTED BY THE COURT

MINIMUM SALARIES FOR TEACHERS WITH MASTER'S DEGREES

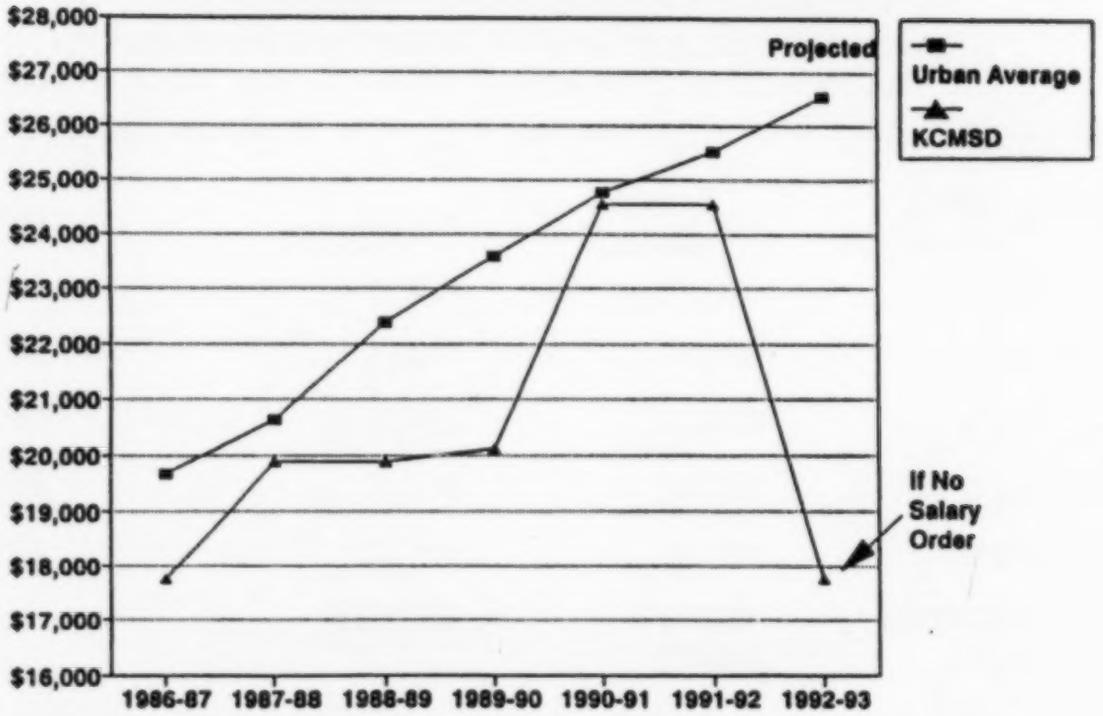
Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	17,754	19,670	1,916	10.8%
1987-88	19,890	20,640	750	3.8%
1988-89	19,890	22,385	2,495	12.5%
1989-90	20,111	23,570	3,459	17.2%
1990-91	24,548	24,760	212	0.9%
1991-92	24,548	25,515	967	3.9%
1992-93 (Proj.)	24,548	26,536	1,988	8.1%

MAXIMUM SALARIES FOR TEACHERS WITH MASTERS'S DEGREES

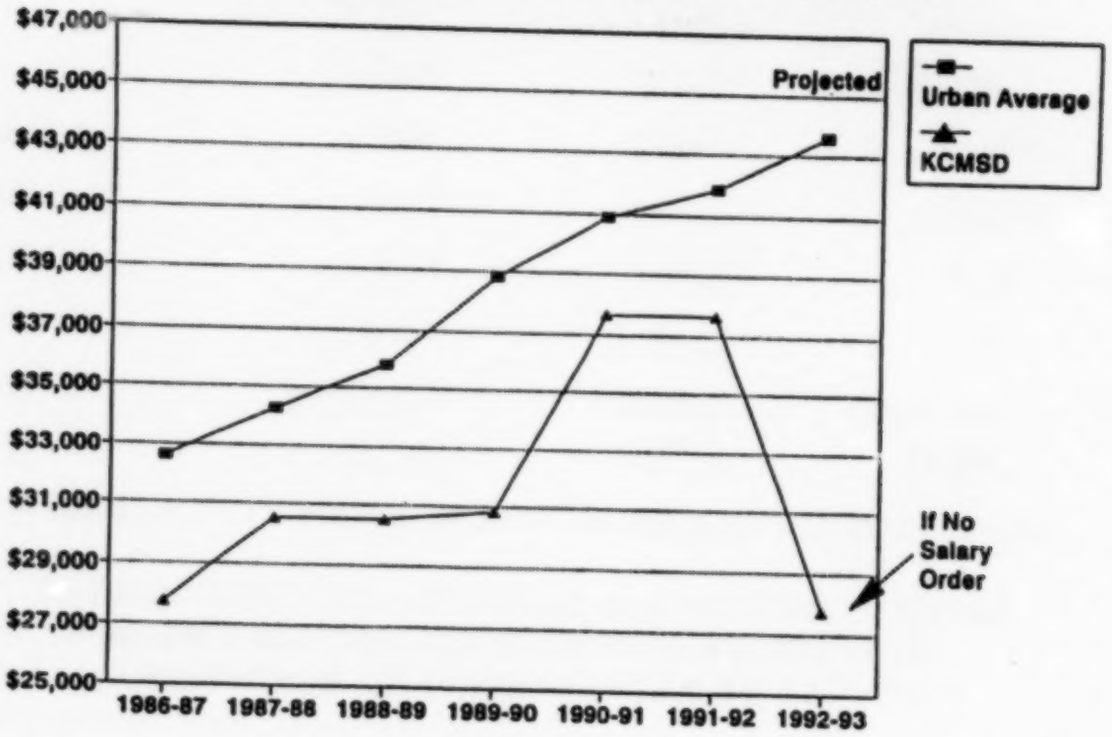
Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	27,744	32,630	4,886	17.6%
1987-88	30,510	34,240	3,730	12.2%
1988-89	30,510	35,825	5,315	17.4%
1989-90	30,849	38,870	8,021	26.0%
1990-91	37,654	40,910	3,256	8.6%
1991-92	37,654	41,920	4,266	11.3%
1992-93 (Proj.)	37,654	43,597	5,943	15.8%

Note: KCMSD salaries for 1991-92 assume no increase from previous year.
KCMSD salaries for 1992-93 assume adoption of KCMSD's proposal.
Urban average salaries for 1992-93 are projected assuming a
4 percent increase from the previous year.

Minimum Salaries for Teachers with M.A. Degrees
National Urban Average Compared with KCMSD



Maximum Salaries for Teachers with M.A. Degrees
National Urban Average Compared with KCMSD



COMPARISON OF KCMSD TEACHERS' SALARIES WITH AVERAGE URBAN TEACHERS' SALARIES IF DESEGREGATION FUNDING FOR SALARIES CEASES

MINIMUM SALARIES FOR TEACHERS WITH Ph.D DEGREES

Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	18,828	22,235	3,407	18.1%
1987-88	24,156	23,470	(686)	-2.8%
1988-89	24,156	24,500	344	1.4%
1989-90	24,424	25,745	1,321	5.4%
1990-91	29,813	27,055	(2,758)	-9.3%
1991-92	29,813	27,900	(1,913)	-6.4%
1992-93 (Proj.)	18,828	29,016	10,188	54.1%

MAXIMUM SALARIES FOR TEACHERS WITH Ph.D. DEGREES

Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	28,833	36,315	7,482	25.9%
1987-88	36,000	38,270	2,270	6.3%
1988-89	36,000	40,180	4,180	11.6%
1989-90	36,400	43,595	7,195	19.8%
1990-91	44,430	45,840	1,410	3.2%
1991-92	44,430	47,195	2,765	6.2%
1992-93 (Proj.)	28,833	49,083	20,250	70.2%

Note: KCMSD salaries for 1991-92 assume no increase from previous year.
KCMSD salaries for 1992-93 assume no extension of the salary order.
Urban average salaries for 1992-93 are projected assuming a
4 percent increase from the previous year.

COMPARISON OF KCMSD TEACHERS' SALARIES
WITH AVERAGE URBAN TEACHERS' SALARIES
IF KCMSD'S PROPOSAL IS ADOPTED BY THE COURT

MINIMUM SALARIES FOR TEACHERS WITH Ph.D DEGREES

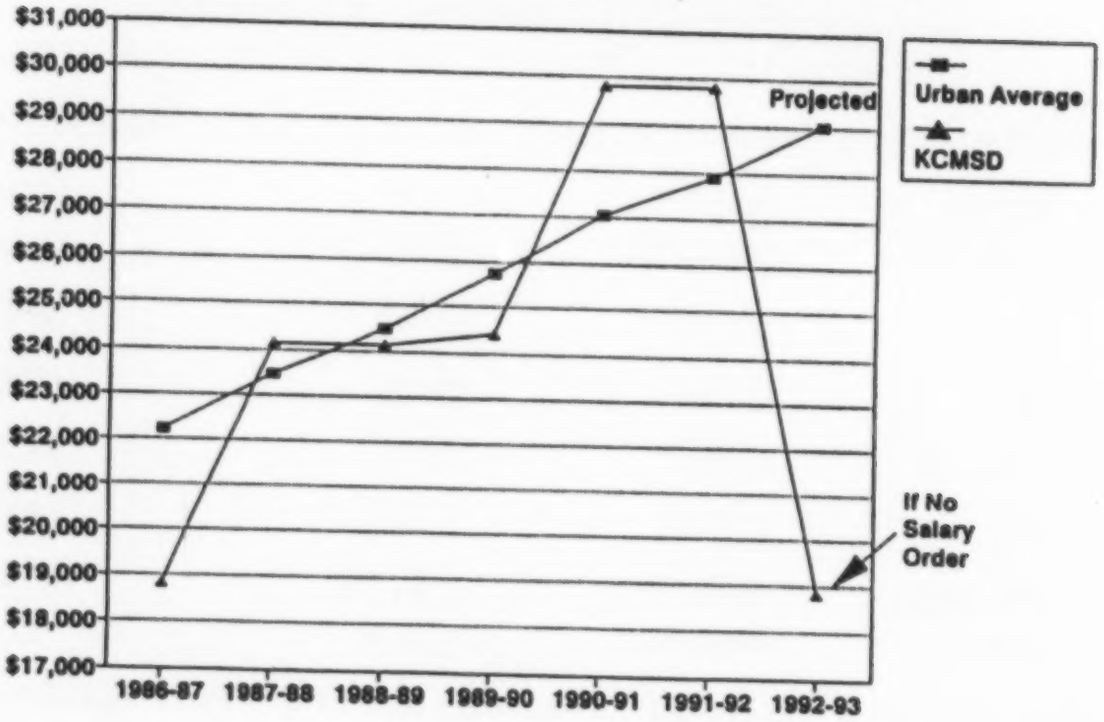
Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	18,828	22,235	3,407	18.1%
1987-88	24,156	23,470	(686)	-2.8%
1988-89	24,156	24,500	344	1.4%
1989-90	24,424	25,745	1,321	5.4%
1990-91	29,813	27,055	(2,758)	-9.3%
1991-92	29,813	27,900	(1,913)	-6.4%
1992-93 (Proj.)	29,813	29,016	(797)	-2.7%

MAXIMUM SALARIES FOR TEACHERS WITH Ph.D. DEGREES

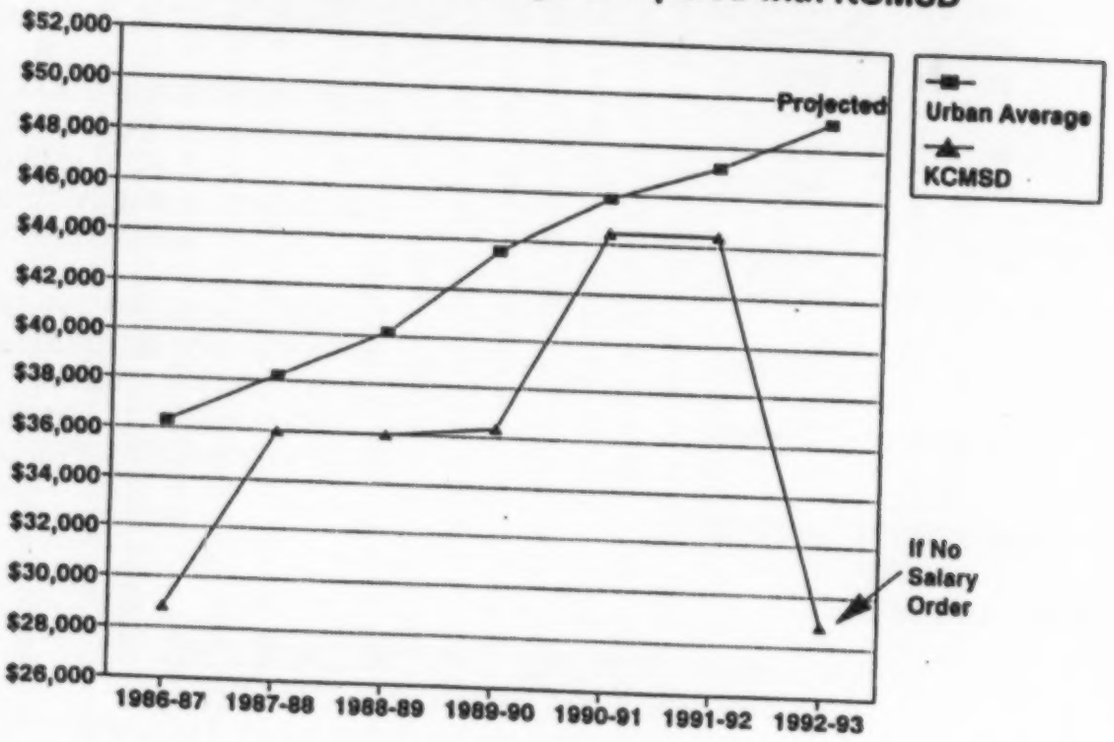
Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	28,833	36,315	7,482	25.9%
1987-88	36,000	38,270	2,270	6.3%
1988-89	36,000	40,180	4,180	11.6%
1989-90	36,400	43,595	7,195	19.8%
1990-91	44,430	45,840	1,410	3.2%
1991-92	44,430	47,195	2,765	6.2%
1992-93 (Proj.)	44,430	49,083	4,653	10.5%

Note: KCMSD salaries for 1991-92 assume no increase from previous year.
KCMSD salaries for 1992-93 assume adoption of KCMSD's proposal.
Urban average salaries for 1992-93 are projected assuming a
4 percent increase from the previous year.

Minimum Salaries for Teachers with Ph.D. Degrees
National Urban Average Compared with KCMSD



Maximum Salaries for Teachers with Ph.D. Degrees
National Urban Average Compared with KCMSD



KANSAS CITY MISSOURI SCHOOL DISTRICT
SALARY PACKAGE FOR 1992-93
ESTIMATED COST PROJECTIONS

	PROPOSED	CURRENT AMOUNT ALLOCATED	ADDITIONAL FUNDS NEEDED
MAINTAIN CURRENT TEACHER SALARY LEVEL FOR TEACHERS CURRENTLY BUDGETED	35,016,077	33,417,873	1,598,204
PROVIDE CURRENT TEACHER SALARY LEVE FOR TEACHERS PROJECTED FOR YEAR VIII	564,715	0	564,715
MAINTAIN CURRENT SALARIES OF OTHER EMPLOYEES	10,654,870	9,166,659	1,488,211
PROVIDE EQUITY ADJUSTMENTS	1,102,388 (1)	0	1,102,388
LENGTHEN SCHOOL YEAR FOR ELEMENTARY PRINCIPALS (15 DAYS)	231,866	0	231,866
MAINTAIN INSERVICE DAYS FOR NEW TEACHERS	261,746	213,638	48,108
PROVIDE FIVE DAYS OF PARAPROFESSIONAL INSERVICE	220,688	220,688	0
MAINTAIN SUBSTITUTE RATE AT $75 DAY	621,130	450,000	171,130
MAINTAIN EXTRA-CURRICULAR PAY RATES	568,911	675,000	(106,089)
RESERVE	500,000	656,142	(156,142)
TOTAL	49,742,391	44,800,000	4,942,391

(1) The prior estimated cost projection for equity adjustments submitted with the District's salary proposal was $1,212,704.

APPENDIX AA

Excerpts from Testimony of Dr. Walter Marks
(June 10, 1992)

* * *

[81]

* * *

Q Is the salary proposal that the district had before the court important in the district carrying out its desegregation plan?

A Oh, absolutely.

Q Explain your answer, please?

A It seems to me if you assess in a school district, the major areas that make a school district productive for young people, and that is what we are supposed to be about, is the quality of teaching that is being performed in the classroom. And it seems to me if you are not paying adequate wages to people in the classroom delivering that instruction to young people, you are going to get a teaching staff that feels to some degree demoralized. They feel inferior to other people if you are paying them poverty level wages. And as a result, it impacts their delivery system to young people.

I think the other issue that you get into is the kind of conceptuality in the community, how you pay your people. And those usually at the bottom end of a pay scale have a different kind of respect from a [82] community than those being paid an adequate wage. So I think it even boils over into the community.

The last point I would make, why I think it is so imperative we continue this is that you also get into the issue of what people feel they have been promised, what people feel is a workable wage and what they should be paid to do that. And our teachers, I think, have made yeoman progress in implementing this plan.

And to have it continue at the level where we are at right now is absolutely crucial. And I think to remove it would cause massive problems in those areas.

Q And other than teachers, which you have just described, are other KCMSD employees important to the desegregation plan?

A Absolutely. As we testified the last time we were here, I think that all of this makes a total program, whether it is salaries, whether it is teachers or administrators, custodians, secretaries, to get this organization moving and get it to be proud of itself. And to really go out and be proud of what has been accomplished here and to help sell those accomplishments takes everybody in the district. It takes secretaries. People will say how do they impact the educational system. They're the first line of defense. They're usually the people that everybody has to get through. And **[83]** it depends a lot how they relate to the public. So they have a integral part just like everybody else does.

Q What will happen if the district's salary proposal is not approved?

A Well, it would roll the salaries back, as I understand it, to the '86-87 level. And that would have an effect of reducing beginning teachers' salaries from I believe around 22 to 17,000. And it would have the same impact all the way up the line to teachers.

Q Could the district pay for the salaries to make up that difference out of operating funds?

A No, that would be next to impossible.

Q Why do you say that?

A What I found when I came to the district is that we had been using reserves, one time money only to balance the budget. And we came into this year and we had no more reserves and we had no more one time dollars. So we made the hard decision the

operating budget had to be balanced in this district. To do that we had to reduce ten million dollars in that operating budget to balance it for next year. And that has had a major impact on the district. And there just simply are no dollars available after that ten million dollar reduction.

Q What is the district's operating levy?

[84]

A The operating levy, I believe is $2.05, I believe.

Q Has it been frozen at that level for a number of years?

A Yes, it has.

Q Dr. Marks, I am handing you what has been marked as KCMSD Exhibit 42. Do you recognize this?

A Yes, I do.

Q What is this?

A. This is the school district, their current tax levy in our area.

Q How does the KCMSD levy compare now with the other school districts in the area?

A Well, we are at 2.05 on this. And I believe that is the lowest levy that is shown on this page.

* * *

APPENDIX BB

Excerpts from Transcript of Direct Examination of John Alspaugh (February 22, 1993)

* * *

[2311]

* * *

Q And what is your occupation?

A I'm a professor in the College of Education at the University of Missouri-Columbia.

Q And how long have you held that occupation, Dr. Alspaugh?

A Twenty-eight years.

Q Do you have a specialty?

A My specialty is educational statistics and educational research methods.

Q Have you every evaluated student achievement data from a public school district?

A Yes, I have.

* * *

[2312]

* * *

Q How many years have you been conducting this type of the student achievement evaluation?

A The 28 years since I have been a faculty member I've done this type of research.

Q And during that time have you ever published any articles or treatises and scholarly journals?

A Yes, I have.

* * *

[2315]

* * *

Q Why did you switch the focus from your initial exploration of elementary, middle and high schools to only elementary schools?

A Well, first of all, the - there is a relatively small number of middle schools and high schools, and all of the middle schools and high schools have been converted to Magnet schools, so I could not make Magnet versus non-Magnet schools comparisons. So I did - so I dropped - or did very limited analysis on middle and high schools.

Q When you did the analysis that you speak of today, did you reach any conclusions as a result of the research you did?

A Well, it appears to me that there has been a decline in student achievement at the middle school and high school level.

[2316]

Q And do you have those conclusions drawn out in any particular fashion?

A Yes.

Q What are they?

A The overall conclusions from this analysis, basically I have three conclusions, the first one, there is no consistent difference between Magnet and non-Magnet elementary schools in terms of reading and math achievement.

The second conclusion has two parts. In the first part, there is a difference between the socioeconomic backgrounds of students assigned to Magnet versus non-Magnet schools.

Part B of the second conclusion: If you statistically remove the influence that socioeconomic factors contribute to KCMSD student achievement, then students assigned to non-Magnet schools tend to have higher achievement than students in non-Magnet schools.

And third, the implementation of Magnet schools to increase the relative percentage of white students in the elementary schools is associated with lower black student achievement and lower overall student achievement.

* * *

[2321]

* * *

MR. EDELMAN: Your Honor, at this time the State would like to proffer Dr. John Alspaugh as an expert in statistical analysis.

THE COURT: Well, he will be accepted as such.

MR. EDELMAN: Thank you, Your Honor.

[2330]

* * *

Q Does that mean that the children from families with less money tend to show lower reading and math achievement in the KCMSD elementary schools?

A Yes.

* * *

[2339]

* * *

Q Do you consider the differences in characteristics between the students at Magnet schools and the students at non-Magnet schools to be important to this analysis?

A Yes, I do.

Q Why?

A Student achievement is highly influenced by the socioeconomic characteristics of the students, and that will have an impact upon the levels of achievement that I can anticipate.

* * *

[2360]

* * *

Q Dr. Alspaugh, would you please describe the general conclusions you draw from Exhibit No. 70?

A Exhibit No. 70 is concerned with black student achievement. And generally it implies that black student achievement has been declining.

Q Is that a districtwide measure?

A This is districtwide.

* * *

[2366]

* * *

Q Okay. Could you please explain any trend that you find in those data?

A Now, these are MMAT scores from '87 to '92. Consider the first example in the top left-hand corner.

Under reading/language arts in '87, the District was 42 points below state average.

In 1992, they were also 42 points below state average.

So basically for that one there was no change.

Q Okay.

[2367]

A If I proceed on through this, there are 16 comparisons like that that you can make.

Q Yes.

A And if you look at the 16 comparisons, there are 13 comparisons where there is a decline and one comparison I showed you where there is no change and two comparisons where there was a gain. So collectively you would say in terms of their relationship to the State, the District has declining MMAT scores for all subjects, all grade levels.

Q And that's overall with all students?

A These are all students tested by the MMAT in the grades 3, 6, 8 and 10.

Q Well, Dr. Alspaugh, you've reviewed quite a lot of data. Would you please summarize again what you consider to be the important conclusions that you've resulted - that has resulted from your work?

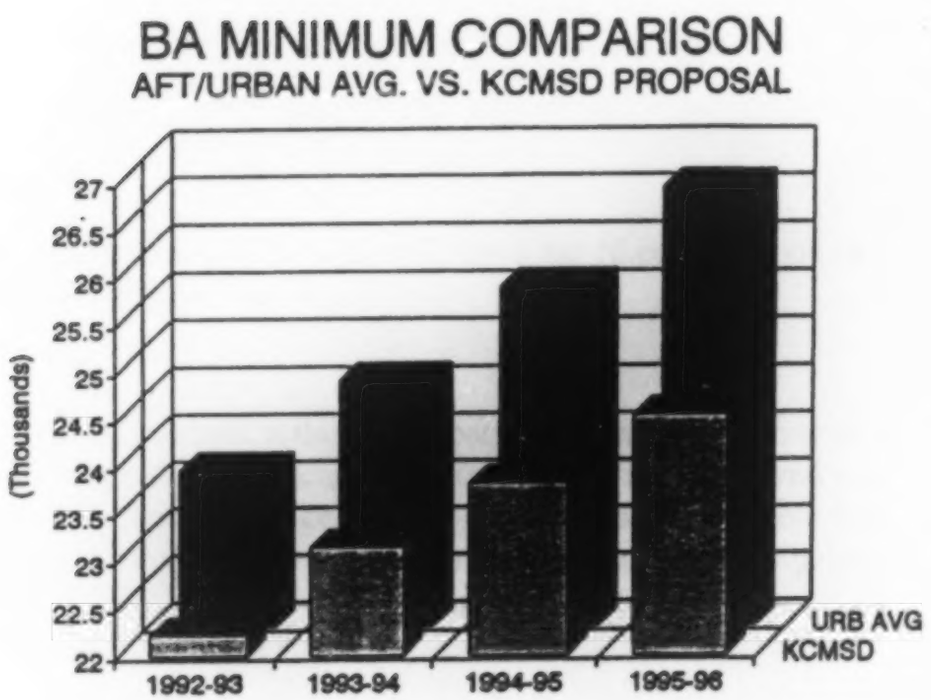
A In summary, my primary conclusion is, the implementation of Magnet schools to increase the relative percentage of white students in the elementary schools is associated with lower black student achievement and lower overall student achievement.

* * *

APPENDIX CC

AFT Exhibits 22a, b, d, e (June 1, 1993)

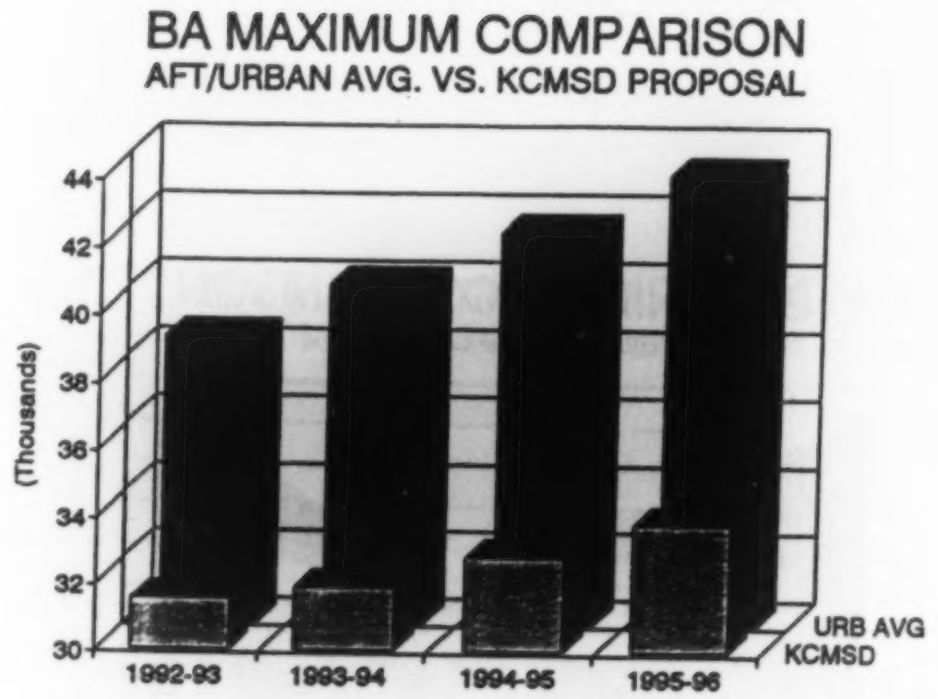
Exhibit 22a



	AFT URB AVG	KCMSD	DOLLAR DIFFERENCE	PERCENT DIFFERENCE
1992-93	23,670	22,215	1,455	6.55%
1993-94	24,617	23,130	1,487	6.43%
1994-95	25,601	23,824	1,777	7.46%
1995-96	26,626	24,539	2,087	8.50%

SOURCE: 1992-93 DOD salary schedule, AFT projections for DOD salaries for 1993-94 through 1995-96, KCMSD salary schedule for 1992-93, and KCMSD salary proposal for 1993-94 through 1995-96.

Exhibit 22b



	AFT URB AVG	KCMSD	DOLLAR DIFFERENCE	PERCENT DIFFERENCE
1992-93	38,490	31,545	6,945	22.02%
1993-94	40,030	31,875	8,155	25.58%
1994-95	41,631	32,831	8,800	26.80%
1995-96	43,296	33,816	9,480	28.03%

SOURCE: 1992-93 DOD salary schedule, AFT projections for DOD salaries for 1993-94 through 1995-96, KCMSD salary schedule for 1992-93, and KCMSD salary proposal for 1993-94 through 1995-96.

Exhibit 22d

BA MINIMUM COMPARISON
1993 PROPOSALS OF ALL PARTIES

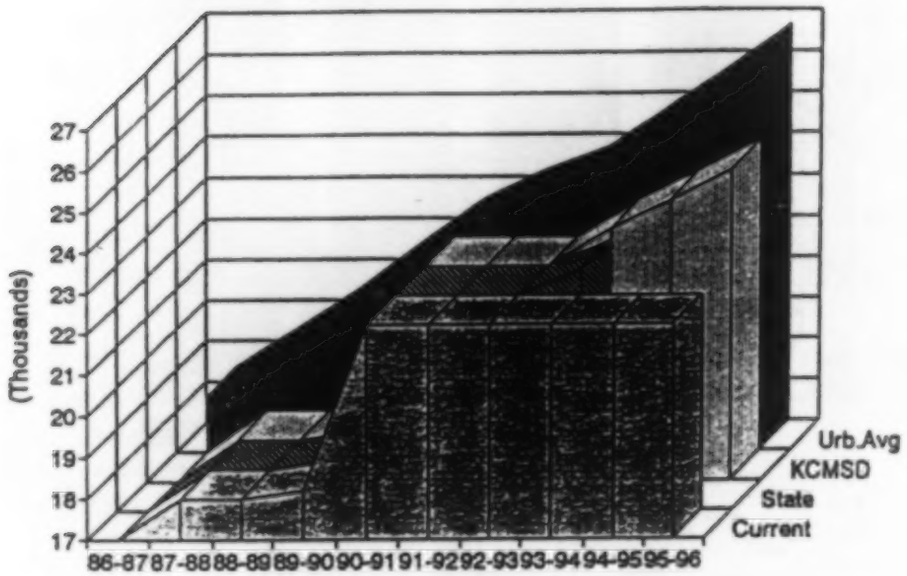
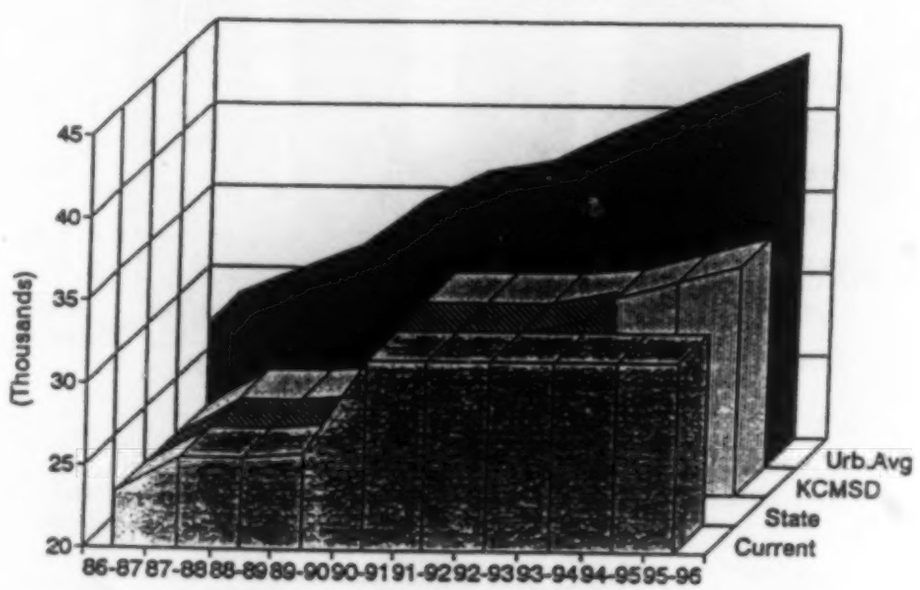


Exhibit 22e

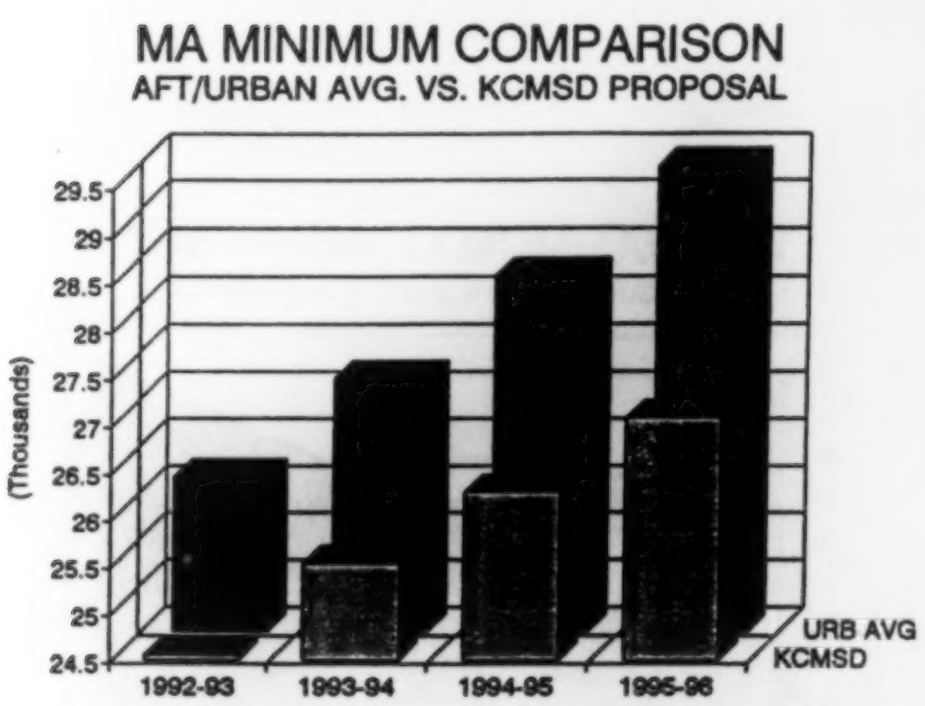
BA MAXIMUM COMPARISON
1993 PROPOSALS OF ALL PARTIES



APPENDIX DD

AFT Exhibits 23a, b, d, e (June 1, 1993)

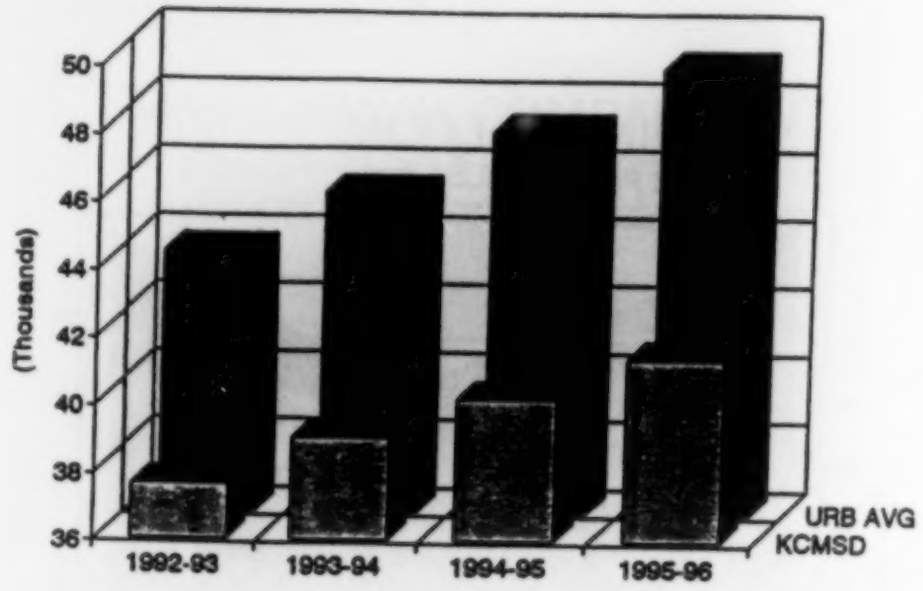
Exhibit 23a



	AFT URB AVG	KCMSD	DOLLAR DIFFERENCE	PERCENT DIFFERENCE
1992-93	26,145	24,548	1,597	6.51%
1993-94	27,191	25,515	1,676	6.57%
1994-95	28,278	26,280	1,998	7.60%
1995-96	29,410	27,069	2,341	8.65%

SOURCE: 1992-93 DOD salary schedule, AFT projections for DOD salaries for 1993-94 through 1995-96, KCMSD salary schedule for 1992-93, and KCMSD salary proposal for 1993-94 through 1995-96.

Exhibit 23b



	AFT URB AVG	KCMSD	DOLLAR DIFFERENCE	PERCENT DIFFERENCE
1992-93	43,670	37,654	6,016	15.98%
1993-94	45,417	39,025	6,392	16.38%
1994-95	47,233	40,196	7,037	17.51%
1995-96	49,123	41,402	7,721	18.65%

SOURCE: 1992-93 DOD salary schedule, AFT projections for DOD salaries for 1993-94 through 1995-96, KCMSD salary schedule for 1992-93, and KCMSD salary proposal for 1993-94 through 1995-96.

Exhibit 23d

MA MINIMUM COMPARISON
1993 PROPOSALS OF ALL PARTIES

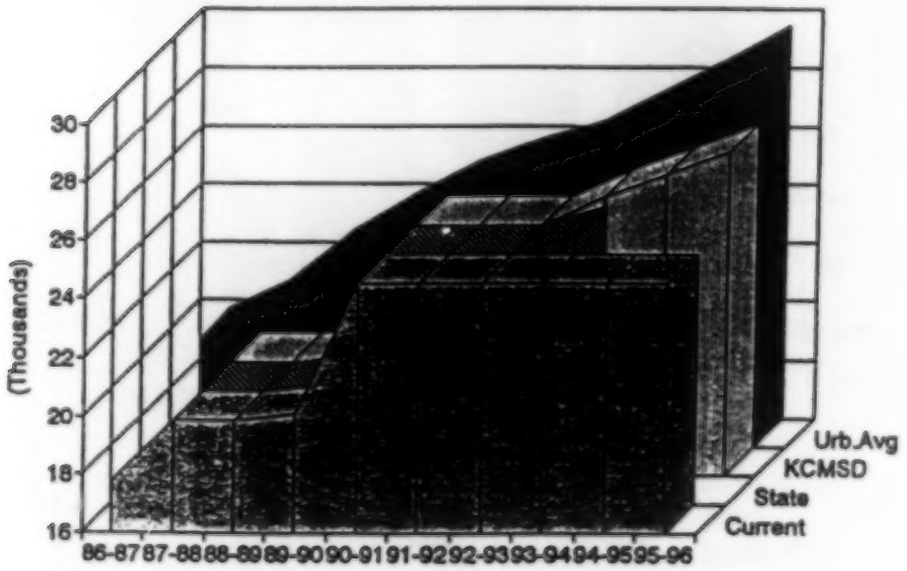
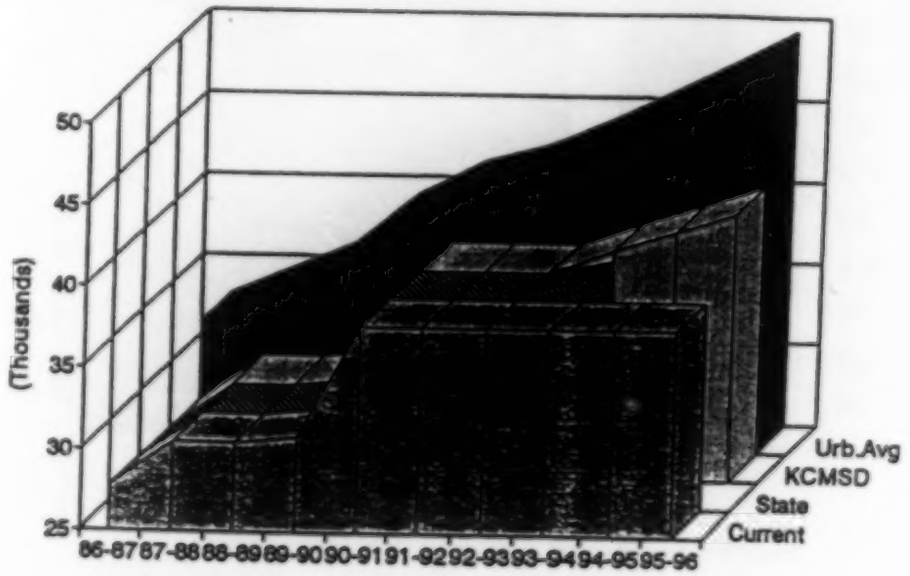


Exhibit 23e

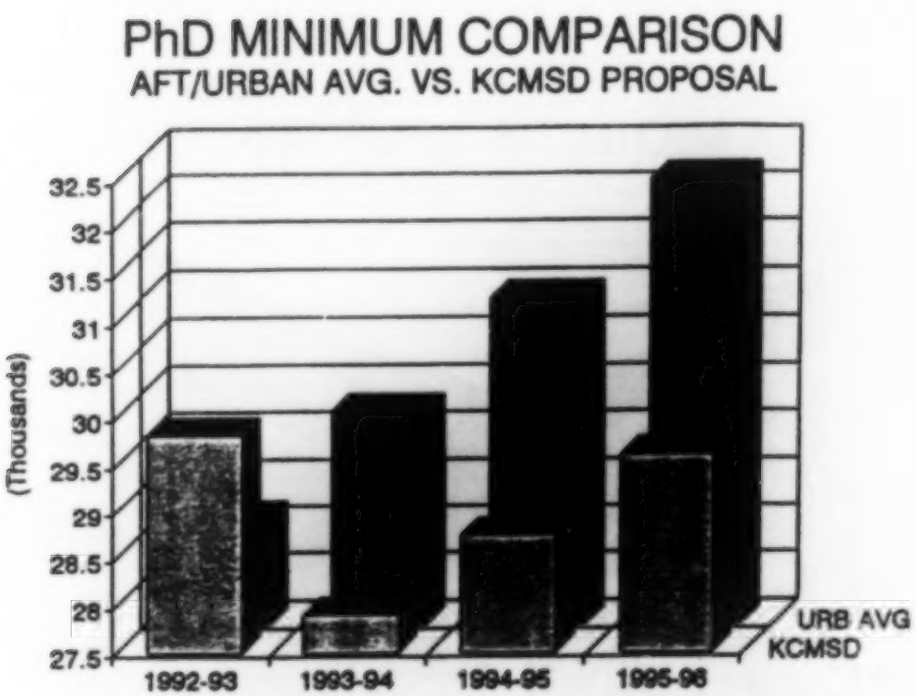
MA MAXIMUM COMPARISON
1993 PROPOSALS OF ALL PARTIES



APPENDIX EE

AFT Exhibits 24a, b, c, e (June 1, 1993)

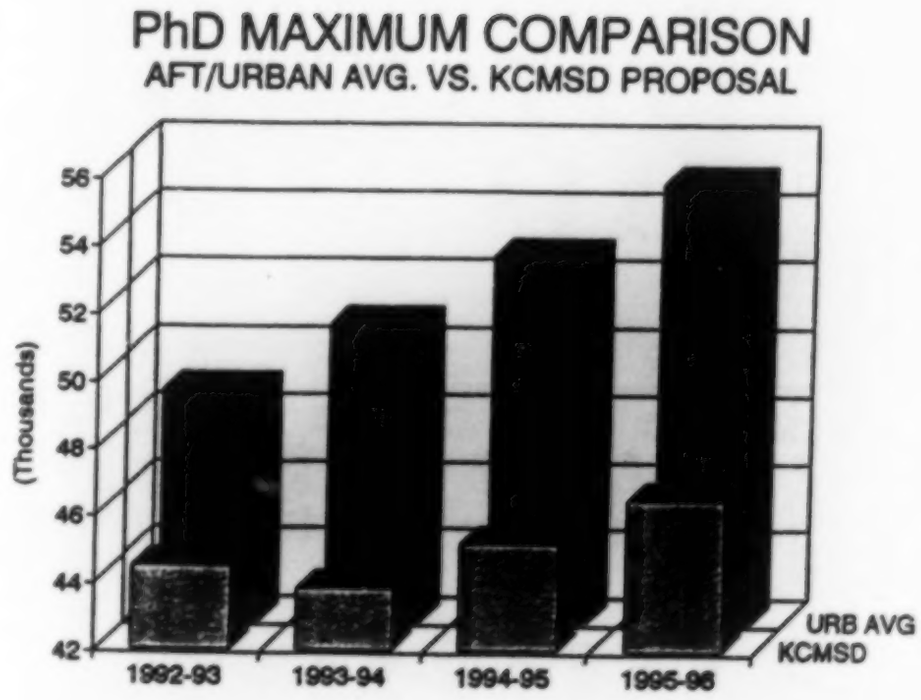
Exhibit 24a



	AFT URB AVG	KCMSD	DOLLAR DIFFERENCE	PERCENT DIFFERENCE
1992-93	28,620	29,813	(1,193)	-4.00%
1993-94	29,765	27,900	1,865	6.68%
1994-95	30,955	28,737	2,218	7.72%
1995-96	32,194	29,599	2,595	8.77%

SOURCE: 1992-93 DOD salary schedule, AFT projections for DOD salaries for 1993-94 through 1995-96, KCMSD salary schedule for 1992-93, and KCMSD salary proposal for 1993-94 through 1995-96.

Exhibit 24b



	AFT URB AVG	KCMSD	DOLLAR DIFFERENCE	PERCENT DIFFERENCE
1992-93	48,850	44,430	4,420	9.95%
1993-94	50,804	43,790	7,014	16.02%
1994-95	52,836	45,104	7,732	17.14%
1995-96	54,950	46,457	8,493	18.28%

SOURCE: 1992-93 DOD salary schedule, AFT projections for DOD salaries for 1993-94 through 1995-96, KCMSD salary schedule for 1992-93, and KCMSD salary proposal for 1993-94 through 1995-96.

COMPARISON OF KCMSD TEACHERS' SALARIES
WITH AVERAGE URBAN TEACHERS' SALARIES
IF KCMSD'S PROPOSAL IS ADOPTED BY THE COURT

MINIMUM SALARIES FOR TEACHERS WITH Ph.D DEGREES

Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	18,828	22,235	3,407	18.1%
1987-88	24,156	23,470	(686)	-2.8%
1988-89	24,156	24,500	344	1.4%
1989-90	24,424	25,745	1,321	5.4%
1990-91	29,813	27,055	250	-9.3%
1991-92	29,813	27,900	(1,913)	-6.4%
1992-93	29,813	28,620	(1,193)	-4.0%
1993-94	27,900	29,765 (Proj.)	1,865	6.7%
1994-95	28,737	30,955 (Proj.)	2,218	7.7%
1995-96	29,599	32,194 (Proj.)	2,595	8.8%

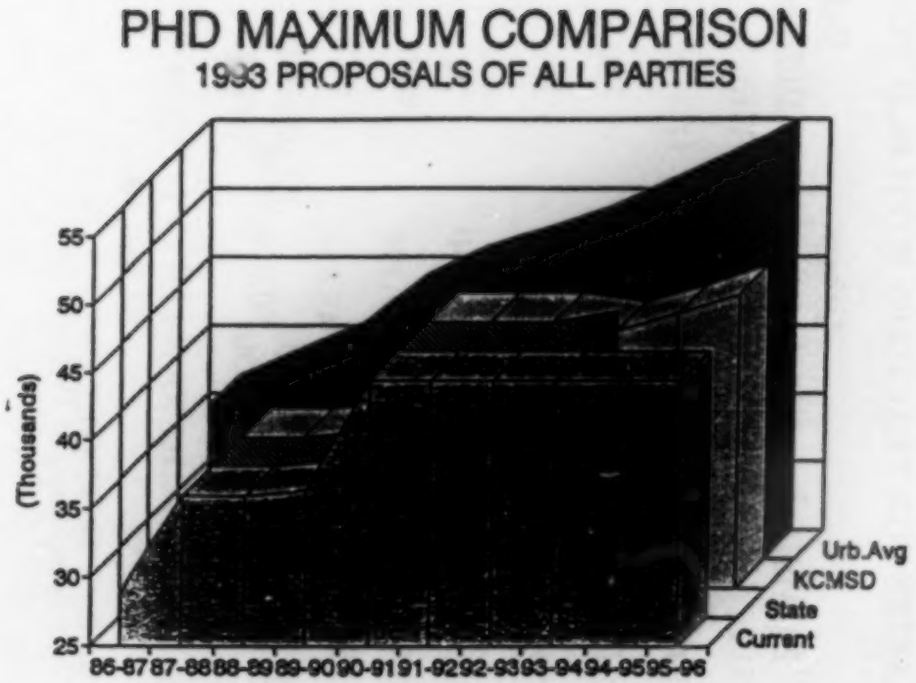
Exhibit 24c

MAXIMUM SALARIES FOR TEACHERS WITH Ph.D. DEGREES

Year	KCMSD	Urban Average	Dollar Difference	Percentage Difference
1986-87	28,833	36,315	7,482	25.9%
1987-88	36,000	38,270	2,270	6.3%
1988-89	36,000	40,180	4,180	11.6%
1989-90	36,400	43,595	7,195	19.8%
1990-91	44,430	45,840	1,410	3.2%
1991-92	44,430	47,195	2,765	6.2%
1992-93	44,430	48,850	4,420	9.9%
1993-94	43,790	50,804 (Proj.)	7,014	16.0%
1994-95	45,104	52,836 (Proj.)	7,732	17.1%
1995-96	46,457	54,950 (Proj.)	8,493	18.3%

Note: Based on KCMSD salary schedules for 1986-87 through 1992-93, KCMSD teachers' salary proposal for 1993-94 through 1995-96, DOD salary schedules for 1986-87 through 1992-93 and AFT projections for DOD teachers' salaries for 1993-94 through 1995-96.

Exhibit 24e



APPENDIX FF

Excerpts from Testimony of Mr. Jewell Gould
(June 1, 1993)

* * *

[220]

* * *

Q I guess based on that, you would agree, wouldn't you, that all other things being equal, a teacher is more closely connected to a child's education than is a grounds keeper at the child's school, wouldn't you?

A Mr. Edelman, I don't want to get in the business here of judging between the teacher and a grounds keeper. The teacher serves a very specific role and is very important to education. And for a district that hasn't given teachers pay increase, the State hasn't supported pay increase for teachers in the last three years, I don't know whether you have the right to even talk about the difference between a grounds keeper and a teacher.

But since you've asked me, I think the grounds keeper is very important because we must go out there and make sure that the people who come to these schools can see the school is well maintained and is well kept and it is safe and it is an important environment for children to learn. With the violence that goes on in schools today, with the problems that go on, every single employee of that school district is important in the scheme of things to make sure that parents choose to put their children in **[221]** public education.

Q I think I understand the depth of your feeling on this issue, but I guess I'm not sure if I heard you state in an area where tough choices have to be made which position as between a teacher and a grounds keeper you feel is more closely related to the child's education?

Do you have a priority on that issue?

A I want teachers to have the ability to address the needs of children. I want teachers not to have the child confused or frightened or concerned because of some element in the school environment.

* * *

[252]

* * *

Q You wouldn't support a desegregation funded pay increase if it were targeted only at teachers and instructional personnel, would you?

A I think it would miss a very important component of the education order of the Court. We have here an order that addresses the physical facilities, the programmatic offerings for their children and the staff. And I think all three share an importance, and I don't know how you separate them out.

* * *

APPENDIX GG

Testimony of Daniel Cutbirth (June 1, 1993)

* * *

[59]

* * *

MR. WOOD: At this time, the AFT would like to call to the stand Dan Cutbirth.

DANIEL CUTBIRTH, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WOOD:

Q Good morning, Mr. Cutbirth.

A Good morning.

Q Could you state and spell your name for the record?

[60]

A My name is Daniel Cutbirth. The last name is spelled C-u-t-b-i-r-t-h.

Q Where are you currently employed, Mr. Cutbirth?

A Kansas City, Missouri School District.

Q And in what position?

A I am the lead distribution supply specialist.

Q What are your duties in that position?

A I supervise the distribution of inter-department mail, I supervise the sorting and distribution of U.S. mail. I supervise the

distribution of District payroll. I order supplies for the print shop.

Q How long have you held that position?

A Approximately three years.

Q When did you begin working for the Kansas City, Missouri School District?

A 1978.

Q What other positions have you held while employed with the District?

A Warehouseperson and warehouse foreman.

Q Do you currently hold other jobs?

A I work for the Service Employees International Union, Local 12.

Q And what is the Service Employees **[61]** International Union Local 12?

A That's the union that represents certain employees in the Kansas City, Missouri School District.

Q How long have you been president of that union?

A Since 1985.

Q Were you an officer before you were president?

A I was vice-president before that.

Q For how long?

A Approximately six years.

Q How long have you been a member of the SEIU, Local 12?

A Since 1978.

Q Can you describe briefly some of the duties and responsibilities you have as president of SEIU, Local 12?

A I chair all membership meetings, all meetings of the executive board, all trials. I'm the chief negotiator for the union. I monitor wages and working conditions.

Q When you say you are chief negotiator, what do you negotiate with the District about?

A Wages and working conditions.

Q Do you have occasion as president of Local 12 **[62]** to monitor local membership levels?

A Yes.

Q And bargaining unit member levels?

A Yes.

Q What employee groups are represented by Local 12?

A The Operations Department, Maintenance Department, mail room, the warehouse and food service.

Q Can you briefly describe for us what goes on in the Operating Department?

A The Operating Department is responsible for the cleaning of the schools, the custodial staff.

Q How many people are in that department currently?

A Approximately 350 to 400.

Q Okay. How about the duties of the employees in the Maintenance Department?

A Those are primarily craftsmen, carpenters, painters, such like that.

Q How many employees currently are in that department?

A Approximately 140.

Q Can you describe the duties of the employees in the warehouse department?

[63]

A Those are the employees that receive stock and distribute goods to District buyers.

Q How many employees are currently in that department?

A I believe there's about 20.

Q The duties of the employees in the mail room department?

A Those employees sort and distribute mail.

Q How many employees are there?

A Five.

Q And the duties of the personnel in the Food Service Department?

A Those are the cooks and bakers, the people who cook and serve the food for the District.

Q And how many people are there in that department?

A I believe there's approximately 350.

Q Have the employee groups you've just described ever received any wage increases from desegregation funds?

A Yes.

Q Do you know when that was?

A It was 1990.

Q Are you familiar with the AFT's motion for desegregation funding for employees represented by **[64]** SEIU, Local 12?

A Yes.

Q Were you involved in preparing that proposal?

A I was.

Q How were you in involved in preparing that proposal?

A Well, I commissioned it. I asked that John Wallstaff to do the wage and salary surveys for me.

Q What did you do with that information?

A I reviewed it and compared it to the data I had.

Q From what sources did you gather the data?

A It was the Department of Labor Area Wage Survey, the Building and Trades Association union scale, the Educational Research Service. We also did a survey of local school districts ourselves. We compared that to our '92-93 handbook wages.

Q Why did you use a number of different sources rather than just one?

A Well, the variety of people that we represent is so great that there really is not one source that I'm aware of that would encompass them all.

Q I'm going to hand you what's been marked as AFT Exhibit 3.

MR. WOOD: May I approach the witness, Your Honor?

[65]

THE COURT: Yes, you may.

Q (By Mr. Wood) Can you identify this document, Mr. Cutbirth?

A Yes.

Q What is it?

A This is the Area Wage Survey that the U.S. Department of Labor does.

Q Excuse me. What was that last part?

A This is the Area Wage Survey that the U.S. Department of Labor commissions.

Q Is this one of the sources of information that you indicated that you relied upon in making your wage comparison?

A Yes.

Q Why did you rely on this particular source of information?

A This information detailed some of the job descriptions I represent, mostly craftsmen.

Q Have you relied on it in the past as a source of wage information for negotiations?

A I have. I use this.

MR. WOOD: Your Honor, I would like to move the admission of AFT Exhibit 3.

MR. MATANIC: No objection, Your Honor.

MR. SNYDER: No objection.

[66]

THE COURT: Exhibit 3 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 3 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) Mr. Cutbirth, I'm going to hand you now what has been marked as AFT Exhibit No. 4. Can you identify that document?

A Yes.

Q What is it?

A This is the wage scales for the Building and Trades Association here in Kansas City.

Q Is this another source of wage information you relied on?

A Yes, it is.

Q Why did you rely on this particular source of information?

A This wage scale has most of our craftsmen positions in here, compared to other craftsmen in Kansas City.

Q Have you relied on it in the past as a source of information for negotiations?

A Yes, I have.

Q Do you know if this report is the type generally relied upon by persons in the occupation of negotiating wages for employees in the building trades?

[67]

A I believe it is.

MR. WOOD: I would like to move the admission of AFT Exhibit 4.

MR. SNYDER: No objection.

MR. MATANIC: No objection.

THE COURT: Exhibit 4 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 4 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) Mr. Cutbirth, I'm going to hand you now what's been marked as AFT Exhibit 5. Can you identify this document?

A Yes.

This is the Educational Research Service report on wages and salaries.

Q And what is the Educational Research Service?

A It is a nonprofit independent company that studies wages and salaries of school district staff.

Q Is this another source of information that you indicated that you relied upon in helping to prepare the proposal?

A Yes.

MR. WOOD: I would like to move the admission of AFT Exhibit 5, Your Honor.

MR. SNYDER: No objection, Your Honor.

[68]

MR. MATANIC: No objection.

THE COURT: Exhibit 5 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 5 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) I'm going to hand you now what's been marked as AFT Exhibit 6. Can you identify this document?

A Yes.

Q What is this?

A This is a portion of the '92-93 Employee Handbook.

Q And what portion is it?

A The salary scales.

Q Is this an accurate copy of those portions of the handbook that contain wage information?

A Yes.

Q Do you participate in developing the wages and working conditions contained in this exhibit?

A Yes, I do.

Q Do the wages that you see listed on this exhibit include the 1990 wage increase from desegregation funds?

A Yes.

Q Did you rely on this exhibit when making your wage comparisons?

[69]

A Yes, this is what I compared them to.

MR. WOOD: Your Honor, I would like to move the admission of AFT Exhibit 6.

MR. SNYDER: No objection, Your Honor.

MR. MATANIC: No objection.

THE COURT: Exhibit 6 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 6 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) I'm going to hand you now what's been marked as AFT Exhibit 7. Can you identify this document, Mr. Cutbirth?

A Yes.

Q What is this?

A This is a summary of the AFT proposal for the employees Local 12 represents for wage increases.

Q Was this document prepared at your direction?

A Yes.

Q Is is an accurate summary of the AFT proposal for Local 12 personnel?

A Yes.

MR. WOOD: I move the admission of AFT Exhibit 7, Your Honor.

MR. MATANIC: No objection, Your Honor.

MR. SNYDER: No objection.

THE COURT: All right. Exhibit 7 will be [70] admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 7 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) Why did you approach the AFT about the possibility of this salary proposal for Local 12 members?

A In the absence of a pay increase for the last three years has greatly affected morale among the employees that I represent; has caused an increase in attrition.

Q In your capacity as president of Local 12, do you have any knowledge about the numbers of people in each department that have been leaving the employment with the Kansas City District offer the last three years?

A I have seen some documentation from the District about attrition rates.

Q What knowledge has that given you?

A That attrition before the Court order was quite high in most of the departments, greatly reduced immediately thereafter and is beginning to increase again.

Q I'm going to hand you now what's marked as AFT Exhibit 9. Can you identify this document, Mr. Cutbirth?

[71]

A Yes. This is the proposed hourly salary schedule for operating employees.

Q How does the proposed hourly salary schedule compare with the existing salary schedule for operating employees?

A There was a 4 percent increase.

Q How did you assist in formulating this particular portion of the proposal?

A Well, I used the aforementioned studies, we used and compared them to what we are being paid currently.

Q And what did you find?

A That pursuant to the Court order of 1990 salaries for the Operating Department were brought fairly close to local standards, but absent a pay increase the last two or three years, we're beginning to slip again.

Q Do you know why a 4 percent increase is being proposed?

A I believe the ERS study mentioned that between '91 and '92 here locally, the average custodial hourly increase was 3.3 percent.

Q Is that AFT Exhibit 5 you're referring to?

A Yes.

Q Can you point to a particular page that gives [72] the information you just gave us?

A Yes. On page Roman numeral 4 under Highlights.

Q And what does it say there?

A That the custodial average mean hourly rate rose 3.3 percent.

Q Do you know if the projected cost of living index was considered when making this proposal?

A It was.

Q By whom?

A I believe Jewell Gould did that.

Q Did Mr. Gould also review the proposal with regard to operating employees?

MR. MATANIC: I'm going to object, Your Honor. I think Mr. Gould ought to be telling us what he reviewed.

THE COURT: The objection will be sustained.

Q (By Mr. Wood) I'm going to hand you now, Mr. Cutbirth, what's been marked as AFT Exhibit 11. This is a three-page document; is that correct?

A Yes.

Q Can you identify the first page of that document?

Mr. WOOD: I'm told I didn't offer [73] Exhibit 9 into evidence. I'd like to do so at this time.

MR. SNYDER: Your Honor, we don't have any objection. I just note for the record that there wasn't an 8.

MR. WOOD: We did skip 8 and 10, Your Honor.

THE COURT: Exhibit 9 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 9 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) Can you identify the first page of Exhibit 11, Mr. Cutbirth?

A Yes. This is a listing of job descriptions for the Maintenance Department.

Q What does it show?

A It shows the wages in '89-90, the current wages and dollar and percent difference.

Q Was this document prepared at your direction?

A It was.

Q What is the second page of this document which is labeled Maintenance Employees Market Wage Comparison?

A This is also the Maintenance Department classifications, listing current wage against market wage and percent difference.

[74]

Q What are the numbers in the column labeled Market Wage?

A Well, two studies were used to determine these market wages. The first was the DOL Area Wage Survey and the other was the Building Trades Union Scale. Where it says AWS, that's the DOL study.

Q AWS is Area Wage Survey?

A Yes.

And when you see Union Scale is 85 percent, that's union scale of the Building Trades Association.

Q Why did you use 85 percent of what was listed as union scale?

A Well, a couple of reasons. The first is that we understand that our benefit package here at the District is different than some of the other unions on the outside. Also, that we were told once a year. Another reason is that many, many years ago, contractually, Maintenance Department salaries were linked by percentage to the union scale on the outside.

Q Can you identify Page 3 of Exhibit 11 which is labeled Maintenance Employees Proposed Hourly Salary Increase?

A Yes.

[75]

Q What is that?

A That is, again, Maintenance Department classification reflecting current wage and the 10 percent increase.

Q Did you make the determination that a 10 percent increase should be proposed?

A I did.

Q Do you know who did?

A I did in conjunction with Jewell Gould.

Q How was that decision made?

A We felt that even though this does not get us anywhere near the two studies, it is a conservative step in the right direction that puts a lot of people fairly close.

Q Did you make a determination that there should be a uniform increase?

A I did.

Q Why did you do that?

A Primarily to not negatively affect morale.

Q I'm going to hand you now what's been marked as AFT Exhibit 12. I think we're back in order again.

MR. WOOD: I've done it again. I failed to offer Exhibit 11. I would like to apologize and do that at this time, Your Honor.

[76]

MR. MATANIC: No objection.

THE COURT: Exhibit 9 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 9 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) Can you identify Exhibit 12, Mr. Cutbirth?

A Yes. This is the proposed hourly salary schedule for warehouse employees.

Q And was this exhibit created at your direction?

A Yes.

Q How were the wages listed on Exhibit 12 determined?

A They were compared to the Department of Labor Area Wage Survey and the Building Trades Union scale.

Q Is the warehouseperson classification, is that the same as in the Maintenance Department?

A Yes.

Q I notice there was a warehouseperson in the Maintenance Department as well.

A That's correct.

Q How about for truck driver?

A They are the same.

Q I notice that the wage listed for stock person [77] is the same as that for warehouseperson. Has that always been the case?

A No, it has not.

Q What has been the case in the past?

A The wage of stock person, warehouseperson have always been almost $2 an hour different, although the job descriptions are identical.

Q Is that why you're proposing that they be the same?

A That's correct.

Q I'm going to hand you what's been marked as AFT Exhibit 13.

MR. WOOD: First, I would like to offer Exhibit 12 into evidence, Your Honor.

MR. SNYDER: No objection.

THE COURT: Exhibit 12 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 12 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) Can you identify what is marked as Exhibit 13? It's two pages.

A Yes. This is the job description for a warehouseperson.

Q What is the second page?

A It's the job description for a stock person.

Q And how do these two compare?

[78]

A They are the same.

Q Are these — the job duties listed, are they accurate examples of what these people do on a daily basis?

A Yes.

Q I notice these are dated in the summer of 1991.

Do you know if these job descriptions have changed any since that time?

A I don't know that.

Q You don't know if they have changed or they —

A I don't know if they've changed.

MR. WOOD: Your Honor , I would like to move the admission of AFT Exhibit 13.

THE COURT: Exhibit 13 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 13 WAS RECEIVED IN EVIDENCE.)

THE COURT: I think now is probably a pretty good time to take a midmorning break. We will take about a 15-minute recess.

(WITNESS TEMPORARILY EXCUSED.)

(A RECESS WAS TAKEN.)

DANIEL CUTBIRTH resumed the stand and testified further:

CONTINUED DIRECT EXAMINATION

[79]

BY MR. WOOD:

Q I'll remind you, you are still under oath Mr. Cutbirth, as we proceed.

I had one more question about Exhibit 13, the last exhibit I believe I handed you. You don't have any reason to believe that these job descriptions have changed since 1991, do you?

A I don't. Contractually, the District has to give any updated job descriptions to the union, and as I said earlier, these are the latest ones I have.

Q Thanks. I'm going to hand you know what's been marked as AFT Exhibit 14. Can you identify this exhibit?

A Yes. This is the proposed hourly salary schedule for the mail room employees.

Q Did you create this exhibit, Mr. Cutbirth?

A Yes.

MR. WOOD: I would like to offer Exhibit 14 into evidence.

MR. EDELMAN: Your Honor, I hate to be technical, but no reason has been given as to this exhibit's relevance yet.

MR. WOOD: I will be happy to do that and move to offer it later.

[80]

Q (By Mr. Wood) What does this exhibit show, Mr. Cutbirth?

A It shows what the salary in the mail room would be if the proposal was so ordered.

Q How do these wages listed on this exhibit differ from those that currently exist?

A There are equity increases.

Q What is the wage for lead distribution and supply specialist based upon?

A It tracks a similar position in the Maintenance Department.

Q And what is the wage listed for truck driver based on?

A It is based on the studies we took from the Area Wage Survey and is also a similar job description to that in the Warehouse Department.

MR. WOOD: I would like to offer once again Exhibit 14.

MR. EDELMAN: No objection.

MR. SNYDER: No objection, Your Honor.

THE COURT: Exhibit 14 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 14 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) I'm going to hand you what's been marked as AFT Exhibit 15. Can you identify **[81]** this?

A Yes. This is the proposed salary schedule for the food service employees.

Q What is the first chart we see on this page?

A The first chart shows current salaries for food service staff.

Q How about the second chart?

A It shows the same classifications with a 6 percent increase.

Q What was your involvement in the formulation of this particular portion of the proposal?

A I reviewed the data we collected from local school districts and the ERS and compared them to current salary.

MR. WOOD: Your Honor, I would like to move the admission of Exhibit 15.

MR. EDELMAN: No objection.

MR. SNYDER: No objection.

THE COURT: 15 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 15 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) There's a second page to that exhibit. What does that show?

A That is the proposed weekly salary schedule for elementary managers that we represent.

[82]

Q What was your involvement in the creation of this proposal?

A The same as on Page 1.

Q I'm going to hand you now — this is one of the exhibits that was out of order earlier — what's been marked as AFT Exhibit 10. Can you identify that document, Mr. Cutbirth?

A Yes. This is hourly wages from Kansas City area schools that we took out of the ERS study.

Q ERS study that was admitted as AFT Exhibit 5?

A Yes.

Q And what does this exhibit show?

A It shows the custodial and cafeteria salaries for school districts near here in Kansas and Missouri, and averages as well.

Q And for the cafeteria employees, how does that average compare to current Food Service Department employees?

A It is higher.

Q Was this average considered when making the proposal for food service employees?

A Yes it was.

MR. WOOD: I would like to move the admission of Exhibit 16, Your Honor.

MR. EDELMAN: No objection.

[83]

MR. SNYDER: No objection.

THE COURT: Did you say 16 or 10?

MR. WOOD: 10, I'm sorry.

THE COURT: It will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 10 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) There's one more exhibit, Mr. Cutbirth. I'm going to hand you what's been marked as AFT Exhibit 16 and this is a two page document. Can you identify this?

A Yes. This is the survey of local suburban school districts.

Q How was this survey conducted?

A I commissioned John Walsh to do that for me.

Q Did you examine the numbers that were collected?

A I did.

Q Are they presented accurately on these two pages?

A Yes.

Q What are you able to tell by the first page of this exhibit?

A Well, the local average of the school districts shown here are much higher than the KCMSD salary average.

[84]

Q What is the local average listed there?

A Seven sixty-five.

Q What is the KCMSD salary for a cook?

A Six twenty-nine.

Q What are you able to tell from the second page of this exhibit?

A That the local average for elementary cafeteria management is 10.21 and the KCMSD salary is 8.77.

Q Was this survey and Exhibit 10, were they the basis for food service employees' proposal that was presented in Exhibit 15?

A Yes.

MR. WOOD: Your Honor, I would like to move the admission of Exhibit 16.

MR. SNYDER: No objection.

MR. EDELMAN: No objection.

THE COURT: Exhibit 16 will be admitted.

(AMERICAN FEDERATION OF TEACHERS' EXHIBIT NO. 16 WAS RECEIVED IN EVIDENCE.)

Q (By Mr. Wood) I would like to refer you, Mr. Cutbirth, back to AFT Exhibit 7, if you can find it.

A I have it.

Q And I would like to direct your attention to [85] the column that says 1994-95 and 1995-96. What does that column show?

A Four percent annual increases, plus step increases.

Q Do you know why the 4 percent annual increases are being proposed for the '94-95 and '95-96 school years?

A Yes.

Q Why is that?

A Because, as I said earlier, the 3.3 figure in the ERS study also projected cost of living increases.

Q On each of the exhibits — I will refer you back to 15, for example. Do you have that in front of you?

A Yes.

Q There is — the third chart down on Page 1 of AFT exhibit 15 is entitled Longevity Schedule. Is that another component of the proposal?

A Yes, it is.

Q How do these rates listed under the Longevity Schedule compare to those that exist now?

A These are higher.

Q Do you know how much higher?

A Approximately four times.

[86]

Q Do you know why that is being proposed?

A We chose to track the longevity schedule proposed by the AFT in another salary proposal.

MR. WOOD: I don't have any further questions at this time.

MR. SNYDER: KCMSD has no questions, Your Honor.

MR. BENSON: Plaintiffs have no questions.

CROSS-EXAMINATION

BY MR. MATANIC:

Q Mr. Cutbirth, I'm Bart Matanic with the State of Missouri. I have some questions for you.

Mr. Cutbirth, you have not had any involvement in planning proposals for the Court's desegregation remedy, have you?

A Other than this proposal?

Q Other than this one.

A No.

Q Mr. Cutbirth, since the Court's April 16th, 1993 magnet order, have any of your supervisors or subordinates contacted you relating to any new duties that would be expected of you because of that order?

A The only think that I can think of is if we **[87]** have a new Montessori school, I would be expected to find a way to distribute to it.

Q When did you think of that, recently after your deposition?

A Yes.

Q Mr. Cutbirth, you can't point to any way in which your duties assist in implementing the voluntary inter-district transfer plan, can you?

MR. WOOD: I object, Your Honor. I think that calls for a legal conclusion.

THE COURT: Objection will be overruled.

A Would you repeat that, please?

Q (By Mr. Matanic) Mr. Cutbirth, you can't point to any way in which your duties assist in implementing the voluntary inter-district transfer plan, can you?

A No.

Q Mr. Cutbirth, there was interoffice mail distribution at the KCMSD prior to 1985, was there not?

A Yes.

Q That's currently one of your duties; is that correct?

A That's correct.

Q And I believe you said earlier that one of **[88]** your duties involves distributing payroll checks?

A That's true.

Q Isn't is true that payroll checks were distributed prior to 1985?

A Yes.

Q Mr. Cutbirth, you did not personally contact anyone at the Educational Research Service for information, did you?

A No.

Q You represent Local 12 in meet-and-confer sessions with the KCMSD, do you not?

A Yes.

Q The AFT's motion on behalf of Local 12 was filed prior to the conclusion of the meet-and-confer sessions with the KCMSD this year, was it not?

A That's correct.

Q And at least one as of May 13th, Local 12 was still negotiating with the KCMSD over wage increases, was it not?

A True.

Q Mr. Cutbirth, there are positions for which AFT seeks desegregation funding on behalf of Local 12 which do not require any kind of specialized training; isn't that correct?

[89]

A Yes.

Q One can apply to be a custodian right off the street, isn't that so?

A Custodian 1?

Q Yes.

A Yes.

Q And one can apply to be a parking lot attendant right off the street; isn't that correct?

A Yes.

Q And no license or course work is required to become a custodian helper; isn't that correct?

A That's correct.

Q You're not aware of any positions for which Local 12 provides representation in the KCMSD that require college degrees, are you?

A No.

Q No license or course work is required to be a warehouseperson; isn't that correct?

A That is correct.

Q And no license or course work is required to become a laborer, is there?

A No.

Q Isn't it correct, Mr. Cutbirth, that you can name only one person who has told you they would leave the KCMSD is salary increases weren't **[90]** granted?

A By name, yes.

Q Let's talk a little bit about recruitment of personnel for the positions Local 12 represents. Mr. Cutbirth, isn't it true that other than for one steam fitter position, you aren't aware of any other positions for which qualified people did not apply?

A That's true.

Q You're not aware of any difficulties the District has had in filling laborer positions, are you?

A No.

Q I would like to talk briefly about Attachment 7 to the Local 12 motion which I believe was an exhibit. It's the one on the custodian/cafeteria positions.

Do you have the exhibit number?

A It's No. 7.

Q My 7 is — I was talking about the comparison of the cafeteria and custodian positions, this document.

MR. WOOD: I think it might be Exhibit 10.

Q (By Mr. Matanic) Now, if I understood [91] correctly, Exhibit 10 represents salaries for comparable positions in other local area districts?

A That's true.

Q Isn't it true, Mr. Cutbirth, that some of those districts pay less to the positions represented, custodian and cafeteria?

A Yes.

Q What's the KCMSD range for custodians? Is it 7.68 to 8.51?

A I believe it is.

Q And for cafeteria, isn't it 5.90 to 6.26?

A I believe so.

Q So Atchison would be lower than — if the KCMSD custodian positions are at 7.68 to 8.51 range, Atchison would be lower than much of that range; is that correct?

A Partly, lower than part of it, yes.

Q You have no evidence that the Atchison district has had any difficulty filling its custodian positions, do you?

A I have no knowledge of that.

Q And for cafeteria positions, if KCMSD is 5.90 to 6.26, Atchison is below all of those; isn't that correct?

MR. SNYDER: Excuse me, your Honor, I [92] would like to register an objection.

This whole line of questioning — I've been a little bit patient here — but I think it appears to be questioning the premise of whether competitive salaries are important to the School

District in order to implement the plan or in order to proceed with this court's orders.

As the opening statements discussed, this court found that it's important for the District to have salaries that are competitive in the appropriate markets, and the State put on evidence on this exact same point last year, so did the School District.

We don't think it's appropriate to rehash all the same points, and I would respectfully object.

MR. MATANIC: Your Honor, if I may, besides looking at the past, this line of questioning also looks at 1992 to 1993, which is included.

THE COURT: I'm going to overrule the objection. But, if you're going on Exhibit 10, I don't follow the figures you've been throwing out.

MR. MATANIC: The reason for that may be [93] that the Kansas City, Missouri ranges are not on there as —

Q (By Mr. Matanic) Is that correct, Mr. Cutbirth?

A That's correct.

MR. MATANIC: Mr. Cutbirth indicated that for custodians in Kansas City, Missouri, the rate of pay is between $7.68 and 8.51; for cafeteria workers, KCMSD pays between 5.90 and 6.26.

THE COURT: What exhibit shows that?

Q (By Mr. Matanic) Does any exhibit show that, Mr. Cutbirth?

A Yes.

THE COURT: The No. 10 shows Kansas City custodian at 12.28.

MR. MATANIC: That's Kansas City, Kansas, Your Honor.

THE COURT: It doesn't say Kansas City, Kansas.

MR. MATANIC: Those are — that's the one under Kan sas.

THE COURT: Okay. All right.

THE WITNESS: Mr. Matanic, it would be Exhibit 6.

Q (By Mr. Matanic) is there a comparable figure **[94]** in Exhibit 6 to the $6.74 we see for Fort Osage in Exhibit 10?

A Okay. I have them both. Could you repeat that, please?

Q Is there a comparable figure in Exhibit 6 for the 6.74 we see for custodians at Fort Osage and Exhibit 10 or is the 6.74 an average?

A Okay. The 6.74 you're speaking of is the custodial wage at Fort Osage?

Q Correct.

A Okay. Well, the average custodial salary in Exhibit 6 is 7.068 to 8.51.

Q Is there one single number we can use to compare to the 6.74 we see in Exhibit 10 for Fort Osage?

A You mean the average of the KCMSD custodial salary?

Q If that's what these are in Exhibit 10, yes.

A I'm not sure that we have an average in here.

Q Okay.

MR. MATANIC: That's why I was talking about the ranges, Your Honor, we don't have an average.

Q (By Mr. Matanic) Mr. Cutbirth, Lawrence, Kansas, at 7.24 for custodians pay less than the **[95]** KCMSD pays custodians under any circumstances; isn't that correct?

A Yes.

Q You don't know whether the Lawrence district has had any difficulty in filling its custodian or cafeteria positions, do you?

A I have no knowledge of that.

Q In fact, isn't it true that the KCMSD has not had any difficulty in filling its custodian or cafeteria positions?

A On the cafeteria side, I believe there has been no problem. Custodial side is currently understaffed.

Q Are you saying that KCMSD has had difficulty filling the custodian positions?

A No, they haven't had difficulty filling them.

Q You believe the custodian rates for the KCMSD are competitive with the other hourly rates listed in Exhibit 10, do you not?

A Fairly close.

Q You've not looked at any statistics on attrition rates for positions represented by Local 12, have you?

A Yes.

Q You have?

[96]

A Yes.

Q When did you do that?

A Week and a half to two weeks ago.

Q After your deposition?

A That's correct. I believe my attorney sent that to you.

Q You hadn't done that analysis before the motion was filed?

A No.

Q Mr. Cutbirth, let's look at Exhibit 10 again. The Kansas City, Kansas School District pays custodians considerably more than the KCMSD does; isn't that correct?

A Yes.

Q You're looking at $12.28 compared to a range of $7.68 and $8.51, correct?

A Correct.

Q You're not aware of anyone that has ever left the position as a custodian with KCMSD to become a custodian with the Kansas City, Kansas School District, are you?

MR. SNYDER: Your Honor, I just want to renew my objection. If we take each school district anywhere in the area and ask whether that district has ever lost employees or whether our [97] district has lost employees to that district is simply rehashing the fundamental question of whether competitive salaries are the appropriate standard. The Court has ruled that competitive salaries or relevant and looking at every school district, we will be here all day and I don't think it will be of any assistance.

MR. MATANIC: Your Honor, if I may, we're not going to look at every school district, and I think Mr. Cutbirth testified on direct that there had been some attrition problems, and I would like to get to that issue.

THE COURT: Well, all right, get at that issue rather than taking it district by district.

MR. MATANIC: I have just a couple of examples.

Q (By Mr. Matanic) Did you answer the last question?

A I don't think I did.

Q You're not aware of anyone that has ever left the position as a custodian with the KCMSD to become a custodian with the Kansas City, Kansas School District, are you?

A Not by name, no.

Q And Kansas City, Kansas also pays [98] warehousepersons more than KCMSD does; isn't that correct?

A Yes.

Q And you're not aware of anyone who is a warehouseperson with the KCMSD who's ever left to become a custodian with the Kansas City, Kansas School District, are you?

A You mean warehouseperson?

Q Yes.

A No.

Q I'm sorry. You're not aware of whether any KCMSD custodians have even applied to be custodians with the Kansas City, Kansas School District are you?

MR. SNYDER: I'd just like to note my continuing objection, Your Honor.

THE COURT: I'm going to sustain it at this point. Let's move on.

Q (By Mr. Matanic) Mr. Cutbirth, you believe the 1990 Lee and Burgess study was flawed in its examination of the Maintenance Department, don't you?

A Yes.

Q You believe maintenance people are doing a good job currently, do you not?

[99]

A Yes.

Q You're not currently seeking other employment, are you, Mr. Cutbirth?

A No.

Q Do you have any knowledge currently of shortages in the metropolitan area of people qualified to fill the positions represented by Local 12.

A I have no knowledge.

Q For next year, Mr. Cutbirth, you aren't aware of whether any school districts in the Kansas City metropolitan area are going to be net hirers in any of the positions covered by Local 12?

A I don't know.

Q Isn't it true, Mr. Cutbirth, that you don't have any knowledge one way or another whether there will be shortages in the next five years in any of the positions represented by Local 12?

MR. WOOD: I'll object, Your Honor. That calls for speculation on the part of the witness.

THE COURT: He can answer the question. If he doesn't know, he can say he doesn't know.

A I don't know.

Q (By Mr. Matanic) You can't name any particular aspect of the desegregation plan that [100] KCMSD is currently failing to implement, can you?

A No. If more persons were hired for the operating warehouse, maintenance, mail room and food Service Departments, would that potential increase the membership of Local 12?

Q It could.

A I take it, then, that could potentially increase the amount Local 12 receives as union dues, could it not?

MR. WOOD: I'll object to the relevance of this question.

THE COURT: Objection will be overruled.

A Yes.

Q (By Mr. Matanic) Mr. Cutbirth, to your knowledge, has the procedure that the Human Resources Department uses to recruit operating, warehouse, maintenance mail room and food service personnel changed in any way between May of 1989 and May of 1983?

A To my knowledge, no.

THE COURT: Did you mean to say '83?

MR. MATANIC: 1993.

Q (By Mr. Matanic) Did you understand?

A I though I heard you say '89.

[101]

Q '89 and '93.

A I'm not aware of any changes.

Q Finally, Mr. Cutbirth, you would benefit financially if the AFT's motion on behalf of Local 12 were granted, would you not?

MR. WOOD: I'll object to the relevance.

THE COURT: Well, the objection is overruled.

A I would receive a wage increase.

MR. MATANIC: Thank you. No further questions at this time.

REDIRECT EXAMINATION

BY MR. WOOD

Q Mr. Cutbirth, is it you responsibility either as an employee of the Kansas City, Missouri School District or as president of Local 12 to track where employees of the Kansas City, Missouri School district go once they leave employment there?

A No.

MR. WOOD: Thank you.

MR. MATANIC: No further questions.

MR. SNYDER: No questions.

THE COURT: All right, sir, you're free to go.

(WITNESS EXCUSED.)

* * *

APPENDIX HH

Excerpts from Testimony of Mr. Arthur Rainwater (July 7, 1993)

* * *

[23]

* * *

Q Are you aware of any new developments since The Court's order that support the view that while the District has made progress since 1985, there still remains a lot to be done?

A Yes. I believe that the recent accreditation review by the State will support that view. It's our view that we spent a great deal of time on, and I think the State did. The State presented an initial report to us, preliminary report that we took great exception with. We disagreed with the methodology of that report. We disagreed with some of the data that was in report and certainly disagreed with the conclusions.

MR. EDELMAN: Your Honor, I believe to the extent that Mr. Rainwater has testified about the accreditation report, that that report itself is probably the best evidence of what occurred with regard to that process.

THE COURT: Well, I don't gather that he's trying to restate what's in the report.

Objection will be overruled.

[24]

BY MR. BORKOWSKI:

Q Let me ask you another question, Mr. Rainwater, perhaps to clarify. How does the accreditation report that you referred to, in your view, support the view that while the District has made progress, more needs to be done?

A The final report that resulted from our work with the State points out many, many instances, particularly in performance, student performance, as measured by test scores, as measured by drop-out rates, those kind of things, that there is progress being made and that's an important part of the State report. It very clearly says that progress -

MR. EDELMAN: Your Honor, with all due respect, I repose the objection. The witness just began to testify as to what the report said.

THE COURT: Your objection will be overruled. He's using that report to indicate how the program can be improved or matters that should be addressed in improving the program, and I think that's proper. The objection will be overruled.

A The report goes on to lead to a provisional accreditation, which I think says there is work still to be done by the Kansas City, Missouri School District. So I believe very clearly progress is being [25] made, according to that report, and that there is still substantial work that needs to be done in the School District.

* * *

[50]

* * *

Q You testified that you believe there still exists vestiges of prior segregation in the KCMSD?

A Yes, sir.

Q You believe one of those vestiges is the continued existence of some racially isolated schools; isn't that correct?

A Yes, I believe that's true.

Q But as far as student achievement is concerned, you don't believe the District and the State are under any court ordered

obligation to reach a certain level of student achievement, do you?

A I do not believe that the Court has ordered a definite level of achievement.

* * *

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: Jan. 10 1994]

This matter is before the Court on the State's motion to alter or amend this Court's Order of August 9, 1993. Both the KCMSD and the plaintiffs have filed responses in support of the State's position on this issue. Additionally, this matter was one of the issues considered in a three day hearing November 15-18, 1993. After considering the arguments presented by the parties and the evidence and information available to the Court, it is the decision of the Court that the DMC be permitted to proceed with supervision of the implementation of the ShareNet Program.

On August 9, 1993 the Court considered the proposal of the DMC with respect to the ShareNet program. The Court reviewed the program and determined that there was a sufficient basis for the continued exploration of the benefits available from the implementation of the program. As a result, the DMC forwarded to the Court a proposed budget and recommendation for the adoption of the program by the Court. The DMC, by resolution dated September 21, 1993, approved the recommendation of the

VIDT Subcommittee in a unanimous vote. The motion of the VIDT Subcommittee read as follows:

> The DMC moves that the budget prepared by ShareNet for implementation of the VIDT plan approved by the Court on August 9, 1993 be forwarded to the District Court for approval. The DMC anticipates that the requested budget allocations for this program will decrease as start-up equipment and initial curriculum development costs are reduced or eliminated, and additional cost efficiencies are developed.

Subsequently, the DMC has submitted to the Court a revised budget, attached hereto, which included additional equipment expense for the KCMSD but reduced the overall budget by approximately $100,000.

The parties presented evidence at the hearing in opposition to the ShareNet proposal. However, the Court did not receive evidence from the DMC at the hearing. The Court finds that it is appropriate to consider the discussions and support of the DMC as substantive evidence in favor of the DMC proposal. The procedure used to bring this matter before the Court is unique and attributable to the nature of this case. There is no proponent of the DMC's proposal other than the committee itself. As the DMC is an arm of the Court, the result is that the Court has brought forth a proposal for a program to be implemented as a part of the remedial plan and this proposal finds no support among the parties to the litigation. The Court finds that it has the inherent authority to shape a remedial plan in manner required to address the effects of segregation and that the ShareNet program is an appropriate method of so doing.

The Court has carefully analyzed the suggestions in opposition to this proposal filed by each of the parties in this case. The Court notes that the evidence presented at the hearing on this matter closely tracked the parties' suggestions. However, the

Court does note that the AFT had no particular opposition to the program nor did it voice any particular support. The Court has determined that the manner in which this proposal ultimately came before the Court may well have had substantial bearing on the ultimate alignment of opposition. The plaintiffs voiced concern that the ShareNet plan was not a bona fide voluntary interdistrict transfer plan as contemplated by the Eighth Circuit. Therefore, plaintiffs argued that the Court should reject ShareNet in favor of their North Kansas City VIT proposal. The Court never contemplated that ShareNet and North Kansas City were either/or proposals. Rather, the ShareNet plan offers opportunities for the children of both the KCMSD and the participating suburban districts to interact both via computer and in joint field trip and summer camp settings. The Court believes that the timing of the consideration of the ShareNet proposal was a significant factor in both the plaintiffs' and the KCMSD's position on this plan.

The KCMSD has nothing to lose and everything to gain from participation in the ShareNet program. The argument that there is not sufficient time to participate in the program is specious at best. The Court points out to the District that when it develops new ideas and concepts for a desegregation funded program there are an infinite number of possibilities for implementation. The Court believes that there was too much consideration given to the either/or argument in favor of the North Kansas City plan and it resulted in the District's opposition to the ShareNet proposal. The District, in hopes of the Court's adoption of the North Kansas City plan, actually requested that the Court defer not deny the ShareNet program. The Court has carefully examined the ShareNet proposal and finds that it does offer opportunities which are beneficial to the remedial plan in the KCMSD.

The State's opposition to the ShareNet proposal is not at all unexpected. The State had sponsored a VIT plan as did the

plaintiffs. While the Court does not believe that the State's plan suffered from the same infirmities that the North Kansas City plan did, the Court's acceptance or rejection of the State's plan has absolutely no bearing on the Court's ultimate approval of the ShareNet program. The Court is not surprised that the State would be opposed to spending tax dollars for desegregation in the KCMSD as this has been a consistent position of the State. Nevertheless, the Court finds that the arguments presented by the State both through briefing and through evidence are not persuasive.

As the Court pointed out before, the ShareNet plan is before the Court in a most unusual procedural posture. The Eighth Circuit has made clear that a proper role of the DMC is to gather information and where possible develop programs that meet the goals of the remedial program. *Jenkins v. State of Missouri*, 981 F.2d 1009, 1015 (8th Cir. 1992). The Court finds that there is sound basis for the approval of the plan. Common sense dictates that where suburban and KCMSD students come together there will be increased opportunities available. The opportunity for interaction through computers is a positive step to the desegregation program. This Order is not to be interpreted as an endorsement of the ShareNet plan as the model for a Voluntary Interdistrict Transfer plan as contemplated by the Eighth Circuit. However, it is the opinion of the Court that the DMC has come forward with a program that offers the possibility of enhancing both the desegregation goal of the remedial plan as well as the possibility of providing a positive educational experience. Both the plaintiffs and the District have brought to the Court countless numbers of programs in the hopes that such programs will meet the aforementioned goals. The Court finds that while ShareNet is not a model VIT plan it does offer sufficient desegregative and educational opportunities for the Court to order it funded as part of the remedial plan.

The Court will order the funding and implementation of the ShareNet plan as proposed to the Court and in accordance with

the amended budget attached hereto. The Court will further order that the KCMSD comply with this Order and participate in a good faith manner in this program. The KCMSD shall set up a selection system for participation in the program whereby the students at the selected schools will have the opportunity for voluntary participation. Moreover, should the participating suburban districts decide to discontinue participation in the first three years they will be responsible for reimbursing the State for the acquisition cost of the equipment. If the KCMSD discontinues participation in the program, the suburban districts will be allowed to keep the equipment supplied under the program but the KCMSD will be required to reimburse the State for the acquisition cost of said equipment. Additionally, if either the suburban district or the KCMSD withdraw from participation in this program in the first three years, the Court will consider a motion for reimbursement by the State for such other costs of implementation as the Court may deem appropriate. After the first three years, should the suburban district elect to discontinue the program, they will be required to return the equipment to the State or reimburse the State the then current value of the equipment. Lastly, the Court finds that while this is not necessarily a model VIT plan as contemplated by the recent Eighth Circuit opinions, it is a program along those lines and will order the State to fund 100% of the cost of the program. The Court will order that the State implement a draw down procedure in accordance with those currently used by the State in order that the expenses incurred as a result of this Order be appropriately funded.

The Court believes that the ShareNet plan offers important opportunities to both the children of the KCMSD and the suburban school districts. This is an important first step in the renewed relationships between these entities. If the remedial plan is to have the success envisioned by this Court it is imperative that a VIT plan be a part of its. While ShareNet is not the model VIT, it is the beginning and has the effect of providing

enhanced multi-cultural as well as educational opportunities to the plaintiff school children. The Court suggests to the parties that they lend their support to this program and build relationships with the suburban districts to ensure future opportunities for reasonable VIT plans.

Accordingly, it is hereby

ORDERED that the State's motion to alter or amend this Court's Order of August 9, 1993 regarding ShareNet is denied; and it is further

ORDERED that the ShareNet proposal forwarded to the Court by the DMC is approved as set out herein; and it is further

ORDERED that the State is to fund 100% of the cost of implementation of the ShareNet plan in accordance with the budget attached hereto; and it is further

ORDERED that the KCMSD is to participate in good faith in the ShareNet program and the KCMSD is to set up a voluntary selection system at the participating schools.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: January 10th, 1994

VOLUNTARY INTER-DISTRICT TRANSFER

PILOT DEVELOPMENT BUDGET

I. *Program Administration*

1.	*Personnel	
	Superintendent of Special Projects .6FTE	$20,000.00
	Assistant .45 FTE	15,000.00
	Outside Auditor CPA	15,000.00
	Outside Evaluator	10,000.00
	Purchasing/Accounts Payable/Clerical (FTE)	15,000.00
2.	Out of Town Travel (4 trips x 2 x $1,000)	8,000.00
3.	Local Travel	750.00
4.	Computer, Printer, Software	1,750.00
5.	Phone	
	a. Line ($35.00 per mo. x 12 mos.)	420.00
	b Installation	125.00
	c. Long Distance/Toll Call	325.00

II. *Program Design/Delivery*

1.	*Peer Teachers on Loan to Support Classrooms	
	Two (2) master teachers @ $50,000 per teacher	50,000.00
2.	Curriculum Development	
	a. Writers' Training	
	Trainers - 4 x $750 per day x 5 days	15,000.00
	Expenses - Travel, etc.	5,000.00
	Writer Stipend $150 per day x 5 days x 25 representatives	18,750.00

*Pro-rated

	b. Research Writing Representatives	
	$150 per day x 20 days x 25 reps.	75,000.00
	c. Transition Development Team	
	$250 per day x 25 days x 4 reps.	25,000.00
	d. Staff support contracted @ $45,000	45,000.00
	e. Materials	
	(Software/Sample Curriculum)	10,000.00
	Materials/Printing Expense	25,000.00
	f. Revision Writing Team	
	Eight (8) writers x 20 days x $150 per day	24,000.00
3.	ShowMe Teacher Training	
	a. Out of Town	
	Workshops, Trainings, Conferences, Site Surveys, Air Fare $500 per persons x 15 people x 1	7,500.00
	Hotel $125 per day x 3 days x 15 people x 1	5,625.00
	*Per Diem $55 per day (15 people x 3 staff dev. days = 45 development days)	2,475.00
	*Staff Stipend/Substitute $75 per day (15 people x 3 staff dev. days = 45 development days)	3,375.00
	b. Project - Specific Training	
	Training (STS, Group Dynamics, Consensus Building, Group Discovery, Cross District, Portfolio Assessment) $700 per day x 20 days x 2 trainers	28,000.00
	Stipend/Sub Pay $75 per day x 10 days x 30 teachers)	22,500.00

Per Diem $15 per day x 10 days x 30 teachers	4,500.00

c. Specialty Workshop (2-5 day)

National Training Teams (Multi-cultural/Conflict Resolution)	20,000.00
Stipend/Sub Pay for Teacher Release 30 teachers x 10 days x $75 per day	22,500.00

III. ***Schools***

1. Classroom Equipment - Suburban District and KCMSD - Pilot Year Only

40 computers @ $1,475 each	59,000.00
40 printers @ $225 each	9,000.00
40 lap tops @ $2,115 each	84,600.00
40 phone lines x $50 per mo. x 12 mos	24,000.00
Installation	10,000.00
License/Software $700 x 30 sets + 20 sets	35,000.00
Materials (supplies/equip) 45 sets x $3,500 per set	157,500.00

2. Student Transportation - Pilot Year Only

Bus Trips	
Two (2) trips per mo. x 4 classrooms x $325 per trip x 9 mos.	23,400.00

3. **Per Pupil School Allocation 87,500.00

SUBTOTAL $985,595.00

*Per diem and staff stipend not to exceed allotments normally provided by sending school district

**Year One allocation adjusted due to partial implementation; $1,750.00 per student x 100 students in succeeding years

IV. ***Summer Camps***

Three Summer Camps for 100 Students (Multi-cultural activities, and science, math, social science experience)	191,620.00

BREAKDOWN OF SUMMER CAMP EXPENDITURES

Personnel

Twelve (12) MTs (Master Teachers) $675/wk x 3 wks + 2 days	27,540.00
Twelve (12) TA's (Teaching Assistants) $400/wk x 2 wks	9,600.00
Administrative Planning/Organizing/Directing	8,500.00
Development of Thematic Units and Class Materials (30 days x $150/day)	4,500.00
Safety/Transportation Officer	Incl. in Transportation Costs
Nurse/EMT $150 $150/day x 30 days	4,500.00
Technology Support $245/day x 30 days	7,350.00
Office Support Staff	4,500.00

Use of Camp Facilities

Scheduling of summer facilities, deposits, reservations, etc.	
Use of camp facilities, admission fees, etc.	36,825.00
Lunch, two (2) snacks and drinks (est. $6.50/day x 110 persons x 30 participant days)	21,450.00

Transportation Costs

Bus transportation (to and from camps) est. @ $1,200/day x 30 days	36,000.00
Bus transportation (field trips) est. @ 4 per session x 475	5,700.00
Student transportation (personal and/or rental)	3,375.00

Other Costs

Guest experts/trainers	2,250.00
Thematic studies equipment and curriculum consumables materials	13,500.00
Safety equipment - rental/purchase (mobile phones and communications, life jackets, etc.)	2,430.00
Computer networking at camps (hookup, etc.)	3,600.00
V.*Totals*	$1,177,215.00
*+5% Contingency	15,469.75
GRAND TOTAL	**$1,192,684.75**

*Contingency based on 5% of non-salaried estimated cost as listed on Appendix A.

APPENDIX A

Out of Town Travel (4 trips x 2 x $1,000)	8,000.00
Local Travel	750.00
Computer, Printer, Software	1,750.00
Phone	
a. Line ($35.00 per mo. x 12 mos.)	420.00
b. Installation	125.00
c. Long Distance/Toll Calls	325.00
e. Materials	
(Software/Sample Curriculum)	10,000.00
Materials/Printing Expense	25,000.00
Out of Town	
Workshops, Trainings, Conferences, Site Surveys,	
Air Fare $500 per persons x 15 people x 1	7,500.00
Hotel $125 per day x 3 days x 15 people x 1	5,625.00
Classroom Equipment - Suburban District and KCMSD - Pilot Year Only	
40 phone lines x $50 per mo. x 12 mos.	24,000.00
Installation	10,000.00
License/Software $700 x 30 sets + 20 sets	35,000.00
Materials (supplies/equip) 45 sets x $3,500 per set	157,500.00
Student Transportation - Pilot Year Only	
Bus Trips	
Two (2) trips per mo. x 4 classrooms x $325 per trip x 9 mos	23,400.00
	$309,395.00

$309,395 x 5% = $15,469.75

APPENDIX JJ

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3975

Kalima Jenkins, by her friend, Kamau Agyei;
Carolyn Dawson, by her next friend Richard Dawson;
Tufanza A. Byrd, by her next friend, Teresa Byrd;
Derek A. Dydell; Terrance Cason, by his next friend,
Antoria Cason; Jonathan Wiggins, by his next friend,
Rosemary Jacobs Love; Kirk Allan Ward, by his next friend,
Mary Ward; Robert M. Hall, by his next friend, Denise Hall;
Dwayne A. Turrentine, by his next friend, Sheila Turrentine;
Gregory A. Pugh, by his next friend, David Winters, on behalf
of themselves and all others similarly situated;

Appellees,

American Federation of Teachers, Local 691,

Intervenor,

v.

State of Missouri; Mel Carnahan, Governor of the State of
Missouri; Bob Holden, Treasurer of the State of Missouri;
Missouri State Board of Education; Peter Herschend, Member
of the Missouri State Board of Education; Raymond
McCallister, Jr., Reverend, Member of the Missouri State
Board of Education; Susan D. Finke, President, Member of
the Missouri State Board of Education; Thomas R. Davis,
Member of the Missouri State Board of Education;
Robert E. Bartman, Commissioner of Education of the State
of Missouri; Gary D. Cunningham, Member of the Missouri
State Board of Education; Rebecca M. Cook, Member of the
Missouri State Board of Education; Sharon M. Williams,
Member of the Missouri State Board of Education;
Jacquelline Wellington, Member of the
Missouri State Board of Education;

Appellants,

School District, of Kansas City;
Walter L. Marks, Superintendent thereof,

Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: March 31, 1994
Filed: May 3, 1994

Before McMILLIAN, Circuit Judge, HEANEY and JOHN R. GIBSON, Senior Circuit Judges.

JOHN R. GIBSON, Senior Circuit Judge.

The State of Missouri again appeals, the second time in less than a year, an order of the district court[1] approving *Milliken II*[2] quality education programs. *Jenkins v. Missouri*, No. 77-0420-CV-W-4 (W.D. Mo. July 30, 1993). In this appeal of the programs ordered for the school years 1993-94 and 1994-95, the State asserts the same argument that we rejected with respect to the 1992-93 school year in *Jenkins v. Missouri*, 11 F.3d 755 (8th Cir. 1994) (*Jenkins IX*) (as amended on denial of rehearing), *rehearing en banc denied*, No. 90-2238 (8th Cir. Mar. 15, 1994). The State made only minor additions to the record the district court had already considered in earlier orders relating to the quality education issues and to the argument that these programs should be declared unitary under *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). The State also argues that one component of the

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[1] The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

[2] *Milliken v. Bradley*, 433 U.S. 267 (1977). These programs included reduce class size, attainment and maintenance of AAA status, full-day kindergarten, early childhood education, extended day, effective schools, and district communications.

quality education programs, the funding for the full-day kindergarten program, has been rendered redundant by the passage of Missouri Senate Bill 380, affecting the school foundation formula. We affirm the district court's order and its decision on the quality education programs.

When KCMSD moved to continue the *Milliken II* quality education programs for the school years 1993-94 and 1994-95, the State raised the *Freeman v. Pitts* argument, as it had with respect to the 1992-93 year. The court held a one-day hearing. KCMSD presented very abbreviated testimony from Dr. Arthur Rainwater that his earlier testimony[3] about the *Milliken II* quality education programs was unchanged--that there was substantial possibility for further improvement, and that the systems were working well. *Cf. Jenkins IX*, 11 F.3d at 765 (summarizing Dr. Rainwater's similar testimony at earlier hearing). The State presented no live witnesses on this issue, but filed a declaration from Dr. Terrance Stewart, essentially reiterating his testimony from the earlier hearing. *Cf. Jenkins IX*, 11 F.3d at 764-65 (summarizing Dr. Stewart's testimony at earlier hearing).

The district court in an order entered July 30, 1993 approved continuation of the *Milliken II* quality education programs for

[3] The district court held an extensive hearing on approval of the *Milliken II* quality education programs for the 1992-93 year, which we have described in *Jenkins IX*, 11 F.3d at 764. While KCMSD's motion to renew those programs was pending, *Freeman v. Pitts* was decided. The State then asked that the *Milliken II* quality education programs be declared unitary under the approach articulated in *Freeman* and *Board of Education v. Dowell*, 498 U.S. 237 (1991). On June 17, 1992 the district court ordered continuation of the *Milliken II* programs for the 1992-93 year, and we affirmed. *See Jenkins IX*, 11 F.3d at 760. We cited as additional support for the district court's order its April 16, 1993 consideration of the *Freeman* issue in adopting the long range magnet renewal plan, and also the district court's July 30, 1993 order concerning the *Milliken II* programs. *Jenkins IX*, 11 F.3d at 761-62. We have ordered, on the State's motion, that the record before the court in *Jenkins IX* be made a part of the record before the court in this appeal.

the school years 1993-94 and 1994-95.[4] The district court articulated its reasons for rejecting the *Freeman v. Pitts* argument in some detail. The district court found the State's arguments that these components were unitary to be unpersuasive. While the quality education components had been partially successful, they had not yet met the goals in their entirety. The State appeals again, relying on the same arguments it advanced in *Jenkins IX*.

I.

In *Jenkins IX*, we affirmed the June 17, 1992 order concerning the *Milliken II* quality education programs for 1992-93. We stated:

> The only evidence before the district court with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made. The evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable. These tests, articulated in *Dowell* and *Freeman*, answer the State's argument that establishment of the programs by compliance with the court order is all that is required.
>
> . . .

[4] At the time of our decision in *Jenkins IX*, we had before us that portion of the July 30, 1993 order dealing with salary issues, but the portion of the order relating to *Milliken II* programs had not been appealed. *See* 11 F.3d at 762. After the district court denied the State's motion for reconsideration on October 20, 1993, the State appealed on the *Milliken II* issues. During argument of *Jenkins IX* the parties did not refer to the July 30, 1993 order, nor was it mentioned in the argument of *Jenkins v. Missouri*, 13 F.3d 1170 (8th Cir. 1993) (*Jenkins X*). In *Jenkins IX* we discussed the *Milliken II* quality education portion of this order insofar as it "fleshes out the meaning of the earlier district court orders." 11 F.3d at 762.

> The State did not try to prove that it has demonstrated a good faith commitment to the whole of the court's decree.

11 F.3d at 765 (citations omitted).

The record now before us relevant to the *Freeman* issue has been supplemented to only a minor degree since the *Jenkins IX* appeal. Examination of the record before the district court when it made its order of July 30, 1993, as well as a review of the record made before its June 17, 1992 order, demonstrate the validity of our conclusions in *Jenkins IX*: that the State did not try to prove a history of good faith commitment to the whole of the court's decree; that the only evidence before the district court was that at best a start had been made; and that the evidence fell short of establishing that the vestiges of past discrimination had been eliminated to the extent practicable. 11 F.3d at 765. The State essentially repeats its arguments in *Jenkins IX* and argues that *Jenkins IX* was wrongly decided. We reject the State's argument on the merits. The court en banc has denied rehearing in *Jenkins IX*, *see Jenkins v. Missouri*, No. 90-2238 (8th Cir. March 1, 1994) (denying rehearing en banc). *Jenkins IX* governs our decision in this case on a record that is essentially identical on the *Freeman* issues.

There is still further reason why we must affirm. As our earlier opinion reflected, and as the record before us in this appeal demonstrates, the position of the State is that having implemented and funded these *Milliken II* programs for a seven year period, its obligation should end.[5] There can be no doubt that this

[5]The State says that its position in the district court was that "*Pitts* justified either an immediate or gradual return to the KCMSD of control and responsibility for the *Milliken II* programs." It summarized its argument by stating that it is "entitled to a declaration of unitary status with regard to the *Milliken II* quality education programs in place in the KCMSD." Further, "with regard to the quality of education component . . . the State sought withdrawal of District Court supervision after presenting evidence of compliance with the desegregation decrees of the District Court."

was its position in *Jenkins IX*,[6] and it maintains the same position today. The implications of the State's position were addressed head-on by the dissent from the denial of rehearing en banc in *Jenkins IX*:

> If the State's claim carries with it the unstated idea that having put the elements of a quality educational program in place it may now take its money and exit, stage left, leaving the KCMSD to finish the scene alone, I believe that partial unitary status is not at hand. But, if an equal opportunity to

[6]The State argued in *Jenkins IX* that it had complied fully with the district court's desegregation decree as to the *Milliken II* programs, "and is entitled to have this aspect of [KCMSD] operations declared unitary, at least regarding the State's obligations." "Because of the State's record of full and satisfactory compliance with this aspect of the desegregation decrees and because the State can do no more to ensure provision of quality education and remedial programs to the KCMSD than it has already done by funding the programs, the State meets squarely this measure of 'unitariness' for the *Milliken II* aspects of the desegregation remedy." The State argued that "this Court should either declare the *Milliken II* aspect of KCMSD's operations to be unitary" or reverse and remand for specific findings of facts.

Before the district court on the motion which led to *Jenkins IX*, the State first filed a rather general objection to the budget for the 1992-93 school year on February 7, 1992. After the decision in *Freeman*, the State filed a response with respect to this school year in which it stated: "*Pitts* supports the immediate elimination of the Year VIII [1992-93] programs as the first step in a phaseout process, the purpose of which is to ultimately totally reestablish local control over school district operations." "[T]he State believes the programs should be returned to local control with extraordinary funding ended now. In the alternative . . . a brief phaseout period could be imposed, gradually increasing the KCMSD responsibility for continued implementation and actual funding of the annual budget programs through its local autonomy and local resources." "It will be up to the KCMSD to decide whether, in what form and to what extent, to continue the programs at issue." "The [c]ourt here can take the first step toward returning control of the KCMSD to the local authorities by terminating its supervision over these annual budget programs, and requiring the District to resume both control and the fiscal responsibility for the continuation of such programs . . ."

> receive a quality education is now permanently available to each student in the KCMSD, and is thus available to erase, if the opportunity is reasonably pursued, the vestiges of past discrimination, then unitary status has been reached and control should be relinquished by the federal courts to the state and local governments.

No. 90-2238, slip op. at 26 (8th Cir. March 15, 1994) (Beam, J. dissenting, joined by Bowman, Wollman, Loken and Morris Sheppard Arnold, JJ.).

The State's position has simply been that its obligation for these programs is concluded and, in the colorful wording of the dissent, that it should "now take its money and exit, stage left." *Id.* This is precisely the meaning of the State's argument that its responsibility and obligation should be terminated. This has been rejected by the judges voting to deny rehearing en banc, and most tellingly by the five judges joining in the dissent to denial of rehearing.

Even when the State makes its alternative argument that if the programs are not terminated, they should be phased out gradually, the result would be increased financial burden on KCMSD. This would raise a serious possibility of substantial elimination or disruption of the quality education programs. Again, the dissent from the denial of rehearing explicitly stated in *Jenkins IX* that "equal opportunity to receive a quality education" should be "*permanently* available to each student in the KCMSD." *Id.* at 26 (emphasis added).

So far as the State is concerned, the crux of its responsibility for the *Milliken II* programs is funding. KCMSD must administer and operate these programs. The State seeks termination of the obligation to fund its share of the cost of these programs. The problem that remains, as the district court has been so mindful during the course of this litigation, is the KCMSD's ability to fund these programs.

As we mentioned in *Jenkins IX*, the district court has called for the parties to submit plans for financing "the magnet schools and the entire school district at a level commensurate with the current funding or at least at a level where the same quality of both facilities and instruction may be maintained," assuming withdrawal of court-ordered fundings within three, five, seven and ten years, alternatively. Order of April 16, 1993, slip op. at 21. The court's order has thus focused sharply on the *Freeman-Dowell* issues. The language of the district court's order in calling for such proposals is sufficiently broad to cover both the phase-out of the magnet school program funding and the *Milliken II* funding.

We are aware that the parties have now made filings with the district court pursuant to the April16, 1993 order, and we presume that the district court will in time conduct hearings on these issues. In *Jenkins IX*, we outlined many of those considerations:

> Among the factors which must inform *the sound discretion* of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that where the predicate for judicial intervention in the first instance.

11 F.3d at 763-64 (quoting *Freeman*, 112 S. Ct. at 1446 (emphasis added in *Jenkins IX*)). We framed the inquiry as outlined in *Dowell*:

> [T]he Supreme Court stated that in determining whether there was constitutional compliance in a school desegregation case, the district court "should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable . . ."

Jenkins IX, 11 F.3d at 763 (quoting *Dowell*, 498 U.S. at 249-50).

The State argues that it has demonstrated its good faith commitment to all of the court's decrees, and that its objection to numerous aspects of the desegregation program in litigation does not negate such commitment or reflect an unwillingness or intransigence toward achieving the goal of providing equal educational opportunity. It argues that it has clearly met the Supreme Court standards for good faith commitment. In essence, the State is asking this court to determine an issue which the Supreme Court in *Dowell* and *Freeman* has made clear is an issue for factual determination by the district court. As we said in *Jenkins IX*, and as the record reflects in the appeal before us, the State has not attempted to make a factual showing on this issue for determination by the district court. 11 F.3d at 765. This issue must first be developed by the district court.

When the district court considers the *Freeman* and *Dowell* issues drawn into sharp focus by its order of April 16, 1993, and now briefed in detail by the parties, we are satisfied that the court will be mindful of its responsibility to make detailed fact-findings as it considers the several inquiries required by *Freeman* and *Dowell*. The long history of this litigation demonstrates that that order will likely be the subject of an appeal, and the district court will render substantial assistance to review on appeal by making a full and complete record. We are confident that when the district court's order is entered, we will have an adequate record before us for our review.

II.

The State also argues that passage of Missouri Senate Bill 380 requires an adjustment in the State's desegregation liability. Senate Bill 380 counts a full-time kindergarten child as one student for purposes of computing the foundation formula aid for school districts in Missouri, whereas the earlier formula counted such children as one-half a student. The State currently pays part of the cost of full-day kindergarten as a *Milliken II* quality education cost. As a result of the combination of Senate Bill 380 and the State's *Milliken II* obligations, the State argues that KCMSD will receive payments greater than the total cost of the full day kindergarten program, and that this is a windfall.

It must first be recognized that the funding under Senate Bill 380 measured by full-day kindergarten students need not be spent on kindergarten programs. It is simply a way of measuring allocations of general state aid that can be used for any school purpose.

The district court recognized that the future impact of Senate Bill 380 was far from certain. The State's witnesses testified that the exact amount KCMSD would receive could be significantly different due to a change in the method by which all students are counted, with the new system relying more heavily on daily attendance than the old system. There is a gradual phase-in of Senate Bill 380 formula in increments of 25% over a four year period, and the new formula would not be entirely implemented until the 1996-97 school year. Further, the appropriation process could increase or decrease the amount of money available, as could the amounts withheld for growth. In addition, there are uncertainties due to the state finance litigation.

These uncertainties are reason enough for affirming the district court's decision to reject the State's argument. Exactly what KCMSD may receive and when it will receive it because of change in the foundation formula is yet to be determined.

The State has not demonstrated that the district court made findings of fact that were clearly erroneous, or abused its discretion in rejecting the State's request to allow an off-set of the full-day kindergarten monies to reflect amounts received under Senate Bill 380.

We affirm the order of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX KK

DMC EXHIBIT 1 (JULY 22, 1994)

DESEGREGATION MONITORING COMMITTEE
FOURTH FLOOR-1211 MCGEE STREET
KANSAS CITY, MISSOURI 64106
816-472-0903

June 21, 1993

The Honorable Russell G. Clark
U.S. District Court for the Western
District of Missouri
3100 U.S. Courthouse
222 N. John Q. Hammons Pkwy.
Springfield, MO 65806

Dear Judge Clark:

The DMC considered and unanimously supported the proposal attached hereto. The Committee forwards this proposal to the Court in the hope that it will be considered as an initial positive step toward establishment of a VIDT plan.

Respectfully submitted,

/s/ Eugene E. Eubanks
Eugene E. Eubanks, Chair

EEE:kwm

Enclosure

cc: Ruth Alderson
Michael Fields
Arthur Benson
Shirley Keeler
Norman Hudson
Dr. Walter Marks

Board Services
scott raisher [sic]
Allen Snyder
Monitoring Committee

The ShareNet Plan

For

VOLUNTARY STUDENT TRANSFER

IN METROPOLITAN KANSAS CITY

I. "Informal Preliminary Proposal Addressing Voluntary Student Transfer In Metropolitan Kansas City" (Text)

II. Philosophical Setpiece

"Educating For a Peaceful World" (Text)

III. Cross-District Research and Discovery Units (Review Materials)

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Sample Projected Units

Section B: Cross-District Discovery Unit Examples

1. "A Dream of A Team"

— Thematic unit with baseball

2. "StarDate 2220"

— Thematic unit based on Water/ecology

Section C: Statistical Data from ShareNet

"SHOW ME-Missouri"
Proposal

INFORMAL PRELIMINARY PROPOSAL

ADDRESSING

VOLUNTARY STUDENT TRANSFER IN

METROPOLITAN KANSAS CITY

Developed and presented by:

The participating Missouri School Districts

of the

ShareNet Association

April 28, 1993

"SHOW ME-Missouri"

This preliminary proposal is submitted by over two-thirds of the participating Missouri School Districts who are members of the ShareNet Association. (At this time all indicators support continued district involvement with the potential of more districts joining in the plan as it is further developed and refined.)

"SHOW-ME-Missouri" is: An Intrinsically Equitable, Academically Challenging, Technology Assisted Program for Grades 6-13, Resulting in an Associate of Arts Degree--

A program of this magnitude and change requires allies and partners. "SHOW ME-Missouri" encourages collaborative relationships among teachers, administrators, community leaders, college faculty, policymakers and associations. We know that significant and lasting change takes time. "SHOW-ME-Missouri" is a thoughtful and deliberate approach measured in multiple years or even a decade. Today's students will receive some benefit before they graduate, but future generations will receive the full benefits.

MISSION STATEMENT

"SHOW-ME-Missouri's Mission:

The grand challenge for the educational community created by the "SHOW ME-Missouri" Project is:

- to help students build themselves into equitable persons and academically skillful students through an innovatively structured, technology supported, educational design
- to provide, through the joint efforts of the community colleges, the K-12 public school environment and the

community, a resource-rich, educationally sound, multi-district project that is a bias-free student centered program

GOALS

- To provide a new learning community which is collaborative and free from the barriers created by prejudice and discrimination
- To shape in each student the beginnings of lifelong learning, providing experiences and guidance that promote the skill and confidence to continue that process, even as technology continues to change the ways learning is offered and accessed
- To establish learners who can move effectively and naturally among the tools of technology, in the service of their knowledge and growth

BACKGROUND

Our students have a critical need: to establish their character and world-view in an educationally effective environment which assumes and demonstrates equity, sensitivity and justice by invalidating racial, district, ethnic, religious or other artificially imposed barriers. These problems and attempts at their resolution have been the goal of many sincere efforts to bring about that climate of genuine equality within the educational environment of the Kansas City, Missouri School District.

Our students have another critical need: to gain technological literacy in this century - and the next. This literacy will be the portal to workplace and civic power. It has been said that very soon technological literacy will constitute a new watershed, the literate side of which will be those with power and the non-literate side those who have no means to enter the mainstream. It would be ironic to free students from one kind of discriminative oppression only to deliver them into another.

This proposal seeks to obviate both dangers. The "SHOW ME-Missouri" program creates an environment in which ethnically mixed students are empowered to learn in a setting of equity, together seeking - through academics and technology - paths to their place in the world. *Through these new educational strategies and tools, students will come together in benign neutrality; learning to the limit of their personal horizon but actively needing inquiry and research interactions with their peers on the learning team as they examine issues of mutual importance.* Increasingly, this same teaming relationship is basic to the workplace for which students are ultimately preparing.

PHILOSOPHY

This strategy recognized many new features. Individual students learn faster, with more passion and with more retention, as they master concepts, in depth, from many academic disciplines while they are learning around a broad theme (Thematic Learning).

Technology is a prejudice-free teaching tool, around which new approaches to education have been created for this program that are oblivious to the personal traits or race of the user. It is a medium that treats everyone the same, rewarding learning, intellect, focus, skill, and collaborative work - while indifferent to all else.

Teachers who are able to "team" their professional disciplines deliver a more effective and compelling learning experience to students (Multi-Disciplinary Team Teaching). Much teacher effort and student frustration stem from the attempt to keep students learning at the same pace. The power of computing technology can release them from that artificial pattern (Individualized Learning).

Time blocks in which this kind of learning goes forward are variable and often much longer than the standard fifty minute

class period, a potentially complicated mechanical problem which is also well served by using computer technology. (Flexible Scheduling)

A new style of "grading" is inherent in this new kind of education, so the products of student inquiry and research are collected as evidence of the student's building skill and conceptual growth in each traditional academic discipline. Artificial standards are no longer employed. The ability to memorize is no longer as important as the quality of understanding and application, as demonstrated by the products of student work. ("Portfolio Assessment")

A program utilizing these assumptions will soon produce students who were ready to do work considered "college level" while still in their high school years (Dual Credit, high school/ junior college)

PROGRAM

Students will enter the program at the middle school - 6th grade - level. They will work in learning teams in which the members are purposely chosen and combined to reflect member diversity. For instance, matching students from an inner city school with the different cultural mix of suburban students in the same work teams will achieve this balance. From the classes that would have been in the traditional system, a new "family" of diverse learning teams will be created. These "SHOW ME" scholars teams will be guided through academic pursuits of challenging inquiry learning.

These students will experience their learning in academically stimulating thematic topics, the content of which will also prepare them to work in their learning teams. Themes will include: systems, comparative cultures, teaming relationships, communication skills and conducting research. The themes will offer students the means to be enthusiastic participants in a stimulating and educational dialog.

As appropriate, students will also have guidance from community mentors or leaders with expertise in fields of endeavor that parallel their studies. They will, in "field trip" contexts, meet together at strategic community sites (community colleges, businesses and cultural locations). These meetings are held to meet the needs of the students by broading [sic] the scope of their thematic learning.

This program is educationally driven, however the students will be required to use the technology to collaborate, conduct research, communicate and complete assignments.

Teachers will guide student inquiry in conducting research, sharing data, resolving conflicts and problem solving. For this task they will need either experience in teaching with these new educational approaches, or specialized training or both. These educators will teach thematically, presenting a common core of learning as part of an interdisciplinary team, working in flexible and non-standard blocks of time, helping students create portfolios for assessment and be adept at using technology in the service of education.

Once trained, even at this early grade, students will easily communicate over the telecommunication system with their distant peers on an almost daily basis, saving conversational interaction for those less frequent times when they can come together and work face-to-face.

The same options will be true of their mentored relationships. The frequent teaching and guiding interactions permitted by student/mentor telecommunication will substantially accelerate the pace of project and inquiries. The mentors can also be contacted by E Mail which makes scheduling easier for the schools as well as the mentor.

These same teaching patterns and configurations will be true at upper levels as well, with different and more demanding contex-

tual requirements. Advanced applications will foster communication and problem solving, including themes in social concerns such as human organization patterns, human development and environmental balances.

At the end of the student's high school junior year, it is anticipated that they will have successfully completed enough required credits to meet high school graduation guidelines.

The last two high school years can position students so they are expected to spend an increasing portion of the class day at one of the metropolitan community colleges to begin additional studies at the college level, for which they will receive both high school and college credit.

By the thirteenth year, the student will have achieved an Associate of Arts degree or the equivalent of two years completed of a four year college program.

The character of the education we are striving for will be oblivious to differences of ethnicity, gender, or cultural origin and highly sensitive to differences of academic skill and inquiry ability. Because the computing and multi-technology tools available today - the very tools that provide global networking and collaboration in the world of work - empower our students to become a part of this world, they will be prepared. They will be a generation of capable individuals who have continually grown in their ability to work productively and with satisfaction among peers who are unlike them in many ways.

THE TRANSITIONAL PHASE

This program will, by the third year, provide an uninterrupted stream for student progress from 6th grade through 13th grade and on to the Associate's Degree. However, during years one and two, the program must begin with logical enclaves of pilot programs at selected grades.

Chart A

Program Growth Chart

Year 1:	6th	7th	8th	9th	10th	11th	12th	13th
Year 2:	6th	7th	8th	9th	10th	11th	12th	13th
Year 3:	6th	7th	8th	9th	10th	11th	12th	13th

In the first year, the program will be introduced at the SIXTH AND TWELFTH GRADE levels. To be accepted into the transitional "SHOW ME" program years, students will simply need to be academically on track (if in upper grades, requirements fulfilled to graduate on time), and free of history of serious disciplinary problems.

The Twelfth graders' involvement in the transitional phase of "SHOW ME" will be natural. Facing the end of their public school career, they are likely to be very attracted by funding support for their first year of college. Unlike those who come after them, these students will have not grown adept in the "SHOW ME" program concepts and skills which five years of involvement through the full program sequence will give future students. However, for this transitional program start-up, they will need readiness for graduation and ability to demonstrate more collaborative and independent work than they may have done in the past.

Transitional "SHOW ME" scholars will spend their mornings at the designated community college, guided by program faculty who accompany them from their high school and by matching

program faculty at the community college. In the morning, they will arrive at their high school campus in their usual way, be bussed to the college campus and be return-bussed in the early afternoon. They may then do high school coursework, participate in extracurricular activities as they wish, and return home in their usual way.

In the third and final year, the program will begin to be an exclusive sequence, in which students may enter at 6th, 7th or 8th grade, but after the 8th grade commitment year, no new students will be admitted. This will naturally mean that the program grows smaller each year as it moves toward year thirteen, with "surviving" students having considerable commitment and abilities to learn within its structure.

Parent information and involvement will be an important part of this program since "SHOW ME's" structure and grading will be new, and they will need to be at ease with the philosophy of the program and their child's future in it.

TEACHER STAFF DEVELOPMENT

In the "SHOW ME" program, education will not happen in the traditional way, but in ways that correspond with future trends in education.

To be effective, teachers will need both desire and flexibility to establish this new learning climate and these new social and intellectual growth patters between educator and student, student and student, or student and mentor.

Inservice education, professional collaboration and experience will all be needed to establish teacher competence and comfort in: cooperative (core-knowledge) teaching, thematic content structuring and delivery of thematic content, flexible time commitments, professional collaboration for distance team teaching, itinerant teaching in several environments and portfolio assessment.

Content mastery, beyond the teacher's specialty discipline, will be required in: managing technology in education, conflict resolution, multi-cultural awareness and teaching inquiry groups.

SUMMARY

With "SHOW ME-Missouri", students will be learning in a medium that reflects the quality of society today and eminently prepares them to evolve with society tomorrow, without gaps between the learning environment and the "real world".

This evolution capacity is in harmony with the premise of the January 1993 School Finance (Kinder) Court decision, Judge Kinder stating in his ruling to the Missouri state [sic] General Assembly that since education is a fundamental right, "it must be maintained at an ever-evolving level to assure the preservation of the rights and liberties of the people." (pg. 28)

The character of the education we are striving for will be oblivious to differences of ethnic, gender, or cultural origin and highly sensitive to differences of academic skill and inquiry ability. Because the computing and multi-technology tools available today - the very tools that provide global networking and collaboration in the world of work - empower our students to become a part of this world, they will be prepared. They will be a generation of capable individuals who have continually grown in their ability to work productively and with satisfaction among peers who are unlike them in many ways.

SUGGESTED CONTRACTUAL CONSIDERATIONS

The following provisions are suggested for the ShareNet Voluntary Inter-district Plan entitled "SHOW ME Missouri".

- Students electing to participate must be "on track to graduate on time"; be free of any past serious disciplinary problems, or issues involving weapons or controlled substances.

- Participating school districts will have a reasonable window of time (i.e. 20 working days) to join or be released from the preliminary plan, contingent upon remarks, suggestions or approval of the appropriate voluntary monitoring committees and the courts.
- The plan will not be implemented until all approvals, court or other's are in place.
- The costs of implementation for the plan shall be borne by the state, with costs clearly spelled out and easy to understand for all parties.
- Participants will be indemnified and held harmless relative to any involvement in this plan.
- Suburban school districts will not be held to student or teacher quotas.

Educating for a Peaceful World

Morton Deutsch

This article outlines a program of what schools can do to encourage the values, attitudes, and knowledge that foster constructive rather than destructive relations, which prepare children to live in a peaceful world. It describes four key components of such programs: cooperative learning, conflict resolution training, the constructive use of controversy in teaching subject matter, and the creation of dispute resolution centers in schools.

Lewis P. Lipsitt served as action editor for this article.

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Families and schools are the two most important institutions that influence developing children's predispositions to hate and to love. Although the influence of the family comes earlier and is often more profound, there is good reason to believe that children's subsequent experiences in schools can modify or strengthen their earlier acquired dispositions. In this article, I outline a program that schools can follow to encourage the development of the values, attitudes, and knowledge that foster constructive rather than destructive relations, which prepare children to live in a peaceful world.

Many schools do not provide much constructive social experience for students. Too often, schools are structured in ways that

pit students against one another. They compete for teachers' attention, for grades, for status, and for admission to prestigious schools. Being put down and putting down others are pervasive occurrences. Many of us can recall classroom experiences of hoping that another student, who was called on by the teacher instead of us, would give the wrong answer so that we could get called on and give the right answer.

In recent years, it has been increasingly recognized that schools have to change in basic ways if we are to educate children so that they are for rather than against one another, so that they develop the ability to resolve their conflicts constructively rather than destructively and are prepared to live in a peaceful world. This recognition has been expressed in a number of interrelated movements: cooperative learning, conflict resolution, and education for peace. In my view, there are four key components in these overlapping movements: cooperative learning, conflict resolution training, the constructive use of controversy in teaching subject matters, and the creation of dispute resolution centers in the schools.[1] I discuss each briefly, with more emphasis on cooperative learning and conflict resolution because I have worked more extensively in these two areas and because they provide a valuable base for education in constructive controversy and mediation.

Cooperative Learning

Although cooperative learning has many ancestors and can be traced back for at least 2,000 years, it is only in this century that there has been development of a theoretical base, systematic

[1] By this emphasis, I do not mean to imply that students should not also acquire at the appropriate age level substantive knowledge in such fields as political science, international relations, arms control and disarmament, economic development, the global environment, and world trade, which are also important to world peace, and other substantive knowledge and skills necessary to function as responsible adults.

research, and systematic teaching procedures for cooperative learning. There are five key elements of cooperative learning (Johnson, Johnson, & Holubec, 1986). The most important is *positive interdependence.* Students must perceive that it is to their advantage if other students learn well and that it is to their disadvantage if others do poorly. This can be achieved in many different ways: through mutual goals (goal interdependence); division of labor (task interdependence); group members (resource interdependence); and by giving joint rewards (reward interdependence).

In addition, cooperative learning requires *face-to-face interaction* in which students can express their positive interdependence in behavior. It also requires *individual accountability* of each member of the cooperative learning group to one another for mastering the material to be learned and for providing appropriate support and assistance to each other. Furthermore, it is necessary for the students to be trained in the *interpersonal and small group skills* needed for effective cooperative work in groups. Finally, cooperative learning also involves providing students with the time and procedures for *processing* or analyzing how well their learning groups are functioning and what can be done to improve how they work together. It is desirable to compose cooperative learning groups that are heterogeneous with regard to gender, academic ability, ethnic background, and physical disability.

Hundreds of research studies have been done on the relative effects of cooperative, competitive, and individualistic learning experiences (see Johnson & Johnson, 1983, 1989). The various studies of cooperative learning are quite consistent with one another and with initial theoretical work and research on the effects of cooperation and competition (Deutsch, 1949a, 1949b) in indicating very favorable effects on students. Students develop a considerably greater commitment, helpfulness, and caring for each other regardless of differences in ability level,

ethnic background, gender, social class or physical disability. They develop more skill in taking the perspective of others, emotionally as well as cognitively. They develop greater self-esteem and a greater sense of being valued by their classmates. They develop more positive attitudes toward learning, school, and their teachers. They usually learn more in the subjects they study by cooperative learning, and they acquire more of the skills and attitudes that are conducive to effective collaboration with others.

It is evident that cooperative education fosters constructive relations. Moreover, when used by skillful teachers, it can help children overcome alienated or hostile orientations to others that they have developed from earlier experiences (see Johnson & Johnson, 1989, and Deutsch et al., 1992, for a more extensive discussion of mental health effects).

However, it is important to realize that, although the concept of cooperative learning is simple, its practice is not. Changing a classroom and school so that they emphasize cooperative learning requires that teachers learn many new skills ways of teaching students cooperative skills, ways to monitor and intervene in student work groups to improve students' collaborative skills, methods of composing student groups and structuring cooperative learning goals so that groups are likely to work well together, ways of developing curriculum materials to promote positive interdependence, ways to create constructive academic controversies within the cooperative groups, and ways of integrating the cooperative learning with competitive and individualistic learning activities. It usually takes teachers about three to four years to become well skilled in the use of cooperative learning.

Sometimes parents and teachers have misconceptions about cooperative learning that make them resistant to it initially.[2] There are several myths that it is well to confront (see Johnson et al., 1986, for a more extensive discussion). The following are four common myths.

1. Cooperative learning does not prepare students for the adult world, which is highly competitive. There are two points to be made. (a) The ability of people to work cooperatively is crucial to building and maintaining stable marriages, families, communities, friendships, careers, and a peaceful world. Although competition has often been stressed as the key to success in the world of work, the reality is that individual as well as corporate success depends on effective cooperation and teamwork (Kohn, 1986). (b) Schools, even with extensive cooperative learning, would provide much experience with individual and group competition. The issue is not to eliminate competition and individualism from the schools but to provide a more appropriate balance with cooperation.[3] Although children are exposed to much competition in schools, my impression is that schools

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[2] There has been little research on factors affecting the acceptance of or resistance to cooperative learning (conflict resolution, constructive controversy, or mediation) programs by teachers, parents, or school systems. My impression is that the interest and demand for such programs have been increasing at an accelerating rate during the past 10 years and that the supply of well-trained experts to train teachers and administrators in these areas is insufficient to meet the demand. In the near future, I expect that schools of education will develop educational programs for new teachers and administrators in these areas.

[3] Not enough research has been done yet to specify an appropriate balance among the different modes of teaching. It would undoubtedly vary as a function of such factors as the skills of the individual teacher, the type of subject matter to be learned, and the characteristics of the students. Nevertheless, the available research indicates that, in a wide variety of contexts and subject matter with diverse students, the use of cooperative learning is beneficial.

rarely teach in a systematic way generalizable skills for being effective competitors.

2. High-achieving students are penalized by working in heterogeneous cooperative learning groups. Research evidence clearly indicates that high-achieving students learn at least as much in cooperatively structured classrooms as they do in the more traditional ones (Johnson & Johnson, 1983, 1989). They frequently learn more: Teaching less able students often solidifies their own laboratively, and they learn how to be mutually respecting despite differences in ability. This is not to deny that some high achievers and help from their teachers and their classmates to appreciate the benefits they can obtain from cooperative learning. It should also be recognized that cooperative learning does not imply that high achievers must learn and work at the same place as low achievers. Nor does it imply that high achievers will lack opportunities to work alone or to work cooperatively with other high achievers.

3. Grading is unfair in cooperative learning. There are many ways of creating positive interdependence in cooperative learning groups; group grading is one way but it is not necessary. When group grades are used, individual grades may also be used. Although students sometimes complain about grades, complaints appear to be less frequent in cooperative learning classrooms than in more traditional ones. Students are able to recognize that how well people do in life is affected not only by how well they perform as individuals, but also by how well the groups, teams, corporations, and nations of which they are members perform.

4. The good students do all the work, the lazy students get a free ride. A central feature in cooperative learning is individual accountability. If a student is "goofing off," this becomes a problem for the group that, with encouragement and appropriate help from the teacher, the group can usually solve. In solving the problem, the group learns a great deal and the poorly motivated,

alienated, withdrawn, or reclusive student often benefits enormously as he or she becomes an active participant in cooperative learning.

Conflict Resolution Training

Conflict is an inevitable feature of all social relations. conflict can take a constructive or destructive course, it can take the form of enlivening controversy or deadly quarrel. There is much to suggest that there is a two-way relation between effective cooperation and constructive conflict resolution. Good cooperative relations facilitate the constructive management of conflict; the ability to handle constructively the inevitable conflicts that occur during cooperation facilitates the survival and deepening of cooperative relations.

In recent years, conflict resolution training programs have sprouted in a number of schools, industries, and community dispute-resolution centers. In this article, I focus on such programs in schools. Although I believe these programs are very promising, they are relatively new and little systematic research on their effectiveness has been done. There are many different programs, and their contents vary with the age and background of the students.

Nevertheless, there are some common elements running through most programs. They derive from the recognition that a constructive process of conflict resolution is similar to an effective, cooperative problem-solving process (in which the conflict is perceived as the mutual problem to be solved) whereas a destructive process is similar to a win-lose, competitive struggle (Deutsch, 1973). In effect, most conflict resolution training programs seek to instill attitudes, knowledge, and skills that are conducive to effective, cooperative problem solving and to discourage the attitudes and habitual responses that give rise to win-lose struggles. Below, I list the central elements included in many training programs, but I do not have the space to describe

the ingenious techniques that are used in teaching them. The sequence in which they are taught varies as a function of the nature of the group being taught.

1. Know what type of conflict you are involved in. There are three major types of conflict: the zero-sum conflict (a pure win-lose conflict), the mixed-motive (both can win, both can lose, or one can win and the other lose), and the pure cooperative (both can win or both can lose). It is important to know what kind of conflict you are in because the different types require different types of strategies and tactics (see Lewicki & Litterer, 1985; Pruitt & Rubin, 1986; Walton & McKersie, 1965). The common tendency is for inexperienced parties to define their conflicts as win-lose even though it is a mixed-motive conflict. Very few conflicts are intrinsically win-lose conflicts, but if they are misperceived to be such, the parties involved are apt to engage in a competitive, destructive process of conflict resolution. This is so unless there are very strong accepted norms or rules regulating the nature of the competitive interaction (as in competitive games).

The strategies and tactics of the different types of conflict differ. In a zero-sum conflict one seeks to amass, mobilize, and use the various resources of power (Lasswell & Kaplan, 1950) in such a way that one can bring to bear on the conflict more effective, relevant power than one's adversary. If this is not possible in the initial area of conflict, one seeks to transform the arena of conflict into one in which one's effective power is greater than one's adversary's. Thus, if a bully challenges you to a fight because you won't "lend" him or her money and he or she is stronger than you (and you cannot amass the power to deter, intimidate, or beat the bully), you might arrange to change the conflict from a physical confrontation (which you would lose) to a legal confrontation (which you would win) by involving the police or other legal authority. Other strategies and tactics in win-lose conflicts involve outwitting, misleading,

seducing, blackmailing, and the various forms of the black arts that have been discussed by Machiavelli (1513/1950), Potter (1965), Schelling (1960), and Alinsky (1971), among others. The strategy and tactics involved in mixed-motive conflicts are discussed below. My emphasis is on the strategy of cooperative problem solving to find a mutually satisfactory solution to the conflict and on the development and application of mutually acceptable fair principles to handle situations in which the aspirations of both sides cannot be realized equally. The strategy and tactics of the resolution of cooperative conflicts involve primarily cooperative fact-finding and research as well as rational persuasion.

2. Become aware of the causes and consequences of violence and of the alternatives to violence, even when you are very angry. Become realistically aware of how much violence there is, how many young people die from violence, the role of weapons in leading to violence, how frequently homicides are precipitated by arguments, and how alcohol and drugs contribute to violence. Become aware of what makes you very angry; learn the healthy and unhealthy ways you have to expressing anger. Learn how to actively channel your anger in ways that are not violent and are not likely to provoke violence from the other. Understand that violence begets violence and that if you "win" an argument by violence, the other will try to get even in some other way. Learn alternatives to violence in dealing with conflict. Prothrow-Smith (1987) has developed a very helpful curriculum for adolescents on the prevention of violence.

3. Face conflict rather than avoid it. Recognize that conflict may make you anxious and that you may try to avoid it. Learn the typical defenses that you use to evade conflict (e.g., denial, suppression, becoming overly agreeable, rationalization, postponement, premature conflict resolution). Become aware of the negative consequences of evading a conflict, such as irritability, tension, and persistence of the problem. Learn what kinds of

conflict are best avoided rather than confronted for example, conflicts that will evaporate shortly, those that are inherently unresolvable, and win-lose conflicts that you are unlikely to win.

4. Respect yourself and your interests, and respect the other and his or her interests. Personal insecurity and sense of vulnerability often lead people to define conflicts as life or death, win-lose struggles even when they are relatively minor, mixed-motive conflicts. This definition may lead to conflict avoidance, premature conflict resolution, or obsessive involvement in the conflict. Helping students develop respect for themselves and their interests enables them to see their conflicts in reasonable proportion and facilitates their constructive confrontation. Helping students learn to respect the other and the other's interests inhibits the use of competitive tactics of power, coercion, deprecation, and deception that commonly escalate the issues and often lead to violence.

Valuing oneself and others, as well as respect for the differences between oneself and others, are rooted in the fundamental moral commitment to the principle of universal human dignity. This core value and its derivatives not only should be emphasized in the curricula of many subject matters (e.g., literature, geography, history, social studies) from kindergarten through the 12th grade, in addition is the conflict resolution curricula, but also should be learned by students from their observations of how teachers and school administrators treat students and other people in and around the schools.

5. Avoid ethocentrism: Understand and accept the reality of cultural difference. Be aware that you live in a community, a nation, and a world with people from many different cultures. People from different cultures may differ from you in their appearance, dress, behavior, perceptions, beliefs, preferences, values, history, and ways of thinking about conflict and negotiation. What you take to be self-evident and right may not seem that way to people from different cultural backgrounds and,

conversely, what they take as self-evident and right may not seem that way to you. Learn to understand and accept the reality of cultural differences; try to understand the other's culture and try to help the other to understand yours. Expect cultural misunderstandings, and use them as opportunities for learning rather than as a basis of estrangement.

6. Distinguish clearly between *interests* and *positions*. Positions may be opposed, but interests may not be (Fisher & Ury, 1981). The classic example from Follett (1940) is that of a brother and sister, each of whom wanted the only orange available. The sister wanted the peel of the orange to make marmalade; the brother wanted to eat the inner part. Their positions ("I want the orange") were opposed, but their interests were not. Often when conflicting parties reveal their underlying interests, it is possible to find a solution that suits them both.

7. Explore your interests and the other's interests to identify the common and compatible interests that you share. Identifying shared interests makes it easier to deal constructively with the interests that you perceive as being opposed. A full exploration of one another's interests increases empathy and facilitates subsequent problem solving. For an excellent discussion of how to develop empathy and a sense of shared interests, see Schulman and Mekler (1985).

When considerable distrust and hostility have developed between the conflicting parties, it may be useful to have third parties help in this process of exploration. The third parties may serve one or more functions. They may serve as facilitators or as conciliators (or therapists) who help the parties control and reduce their distrust and hostility enough to permit them to engage in this process themselves. They may serve as mediators who directly assist the parties in this process themselves. They may serve as mediators who directly assist the parties in this process or even undertake the exploration for the conflicting parties, doing what the parties are unable or unwilling to do.

There has been considerable discussion of such third-party intervention (including the selection, training, and ethical requirements for third parties) in Folberg and Taylor (1984), Kelman (1979), Kressel (1985), Kressel, Pruitt, and Associates (1989), and Rubin (1980).

8. Define the conflicting interests between yourself and the other as a mutual problem to be solved cooperatively. Define the conflict in the smallest terms possible, as a "here-now-this" conflict rather than as a conflict between personalities or general principles that is, as a conflict about a specific behavior rather than about who is a better person. Diagnose the problem clearly, and then seek creative new options that lead to mutual gain. If no option for mutual gain can be discovered, seek to agree on a fair rule or procedure for deciding how the conflict will be resolved. However, not all conflicts can be solved to mutual satisfaction even with the most creative thinking. In such cases, agreeing on a fair procedure to determine who gets his or her way, or seeking help from neutral third parties when such an agreement cannot be reached, may be the most constructive resolution possible (see Lewicki & Litterer, 1985, for an excellent discussion of the strategy and tactics of integrative bargaining). To the extent that the parties see the possibility of a mutually satisfying agreement, they will be more able to listen to one another in an understanding, empathic manner, and, of course, the converse is true too.

9. In communicating with the other, listen attentively and speak so as to be understood. This requires an active effort to take the perspective of the other and to check continually your success in doing so. You should listen to the other's meaning and emotion in such a way that the other *feels* understood as well as is understood. Similarly, you want to communicate to the other your thoughts and feelings in such a way that you have good evidence that he or she understands the way you think and feel.

The feeling of being understood, as well as effective communication, facilitates constructive resolution.

Johnson and Johnson (1987), Lewicki and Litterer (1985), Prutzman, Stern, Burger, and Bodenhamer (1988), and many others have provided excellent discussions and practical exercises for developing effective communicating and listening skills. As a communicator, you want to be skilled in obtaining and holding the other's attention, in phrasing your communication so that it is readily comprehended and remembered, and in acquiring the credibility that facilitates acceptance of your message. Skills in taking others' perspectives and obtaining feedback about the effectiveness of your communications are important. Listening actively and effectively entails not only taking the perspective of the other so that you understand the communicator's ideas and feelings but also communicating your desire to understand the other and indicating, through paraphrasing your understanding or through questions, what you do not understand. Role reversal seems to be helpful in developing an understanding of the other's perspective and providing checks on how effective the communication process has been.

10. Be alert to the natural tendencies to bias, misperceptions, misjudgments, and stereotyped thinking that commonly occur in yourself and the other during heated conflict. These errors in perception and thought interfere with communication, make empathy difficult, and impair problem solving. Psychologists can provide a checklist of the common forms of misperception and misjudgment that occur during intense conflict. These include black-white thinking, demonizing the other, shortening your time perspective, narrowing your range of perceived options, and the fundamental attribution error. The fundamental attribution error is illustrated in the tendency to attribute the aggressive actions of the other to the other's personality while attributing your own aggressive actions to external circumstances (such as the other's hostile actions). The ability to

recognize and admit your misperceptions and misjudgments clears the air and facilitates similar acknowledgment by the other (see Jervis, 1976; Kahnemen, Slovic, & Tversky, 1982; Nisbett & Ross, 1980).

11. Develop skills for dealing with difficult conflicts so that you are not helpless when confronting those who are more powerful, who don't want to engage in constructive conflict resolution, or who use dirty tricks. Fisher and Ury (1981) have discussed these matters very helpfully in the final three chapters of their well-known book, *Getting to Yes: Negotiating Agreements Without Giving In.* I shall not summarize their discussion but rather emphasize several basic principles. First, it is important to recognize that you become less vulnerable to intimidation by a more powerful other, to someone who refuses to cooperate except on his or her terms, or to someone who plays dirty tricks (deceives, welshes on an agreement, personally attacks you, etc.) if you realize that you usually have a choice: You don't have to stay in the relationship with the other. You are more likely to be aware of your freedom to choose between leaving or staying if you feel that there are alternatives to continuing the relationship that you can accept. The alternative may not be great, but it may be better than staying in the relationship. The freedom to choose prevents the other, if he or she benefits from the relationship, from making the relationship unacceptable to you.

Second, it is useful to be open and explicit to the other about what he or she is doing that is upsetting you and to indicate the effects that these actions are having on you. If the other asserts that you have misunderstood or denies doing what you have stated, and if you are not persuaded, be forthright in maintaining that this remains a problem for you. Discuss with the other what could be done to remove the problem (your misunderstanding of the other, your need for reassurance, or the other's noxious behavior).

Third, it is wise to avoid reciprocating the other's behavior and to avoid attacking the other personally for his or her behavior (i.e., criticize the behavior and not the person); doing so often leads to an escalating vicious spiral. It is helpful to look behind the other's behavior with such questions as, "I wonder what you think my reaction is to what you have said?" or "I am really curious. What do you think this will gain for you?" It is also sometimes useful to suggest to the other more appropriate means for pursuing his or her interests than the ones that he or she is currently using.

A phrase that I have found useful in characterizing the stance one should take in difficult (as well as easy) conflicts is to be "firm, fair, and friendly." *Firm* in resisting intimidation, exploitation, and dirty tricks; *fair* in holding to one's moral principles and not reciprocating the other's immoral behavior despite his or her provocations; and in the sense that one is willing to initiate and reciprocate cooperation.

12. Know yourself, and how you typically respond in different sorts of conflict situations. As I have suggested earlier, conflict frequently evokes anxiety. In clinical work, I have found that the anxiety is often based on unconscious fantasies of being overwhelmed and helpless in the face of the other's aggression or of being so angry and aggressive that you will destroy the other. Different people deal with their anxieties about conflict in different ways. I have found it useful to emphasize six different dimensions of dealing with conflict that can be used to characterize a person's predispositions to respond to conflict. Being aware of one's predispositions may allow one to modify them when they are inappropriate in a given conflict. The six dimensions follow.

(a) *Avoiding conflict/excessively involved in conflict.* Conflict avoidance is expressed in denial, repression, suppression, avoidance, and continuing postponement of facing the conflict. Sometimes it is evidenced in premature conflict resolution,

fleeing into an agreement before there is adequate exploration of the conflicting interests and the various options for resolving the conflict. Usually, the conflict that is avoided does not go away; rather, the tension associated with it is expressed in fatigue, irritability, muscular tension, and a sense of malaise. Excessive involvement in conflict is sometimes expressed in a "macho" attitude, a chip on one's shoulder, a tendency to seek out conflict to demonstrate that one is not afraid of conflict. It is also commonly expressed in a preoccupation with conflict -obsessive thoughts about fights, disputes, and quarrels, with much rehearsing of moves and counter moves between oneself and one's adversaries. Presumably, a healthy predisposition involves the readiness to confront conflict when it arises without needing to seek it out or to be preoccupied with it.

(b) *Hard/soft.* Some people are prone to take a tough, aggressive, dominating, unyielding response to conflict, fearing that otherwise they will be taken advantage of and be considered soft. Others are afraid that they will be considered mean, hostile, or presumptuous, and as a consequence, they are excessively gentle and unassertive. They often expect the other to read their minds and know what they want even though they are not open in expressing their interests. A more appropriate stance is a firm support of one's own interests combined with a ready responsiveness to the interests of the other.

(c) *Rigid/loose.* Some people immediately seek to organize and control the situation by setting the agenda and defining the rules. They feel anxious if things threaten to get out of control and feel threatened by the unexpected. As a consequence, they are apt to push for rigid arrangements and rules and get upset by even minor deviations. At the other extreme, there are some people who are aversive to anything that seems formal, limiting, conditional, or constricting. They prefer a loose, improvisational, informal arrangement in which rules and procedures are implicit rather than overt. An approach that allows for both

orderliness and flexibility in dealing with the conflict seems more constructive than one that is compulsive either in its organizing or in its rejection of orderliness.

(d) *Intellectual/emotional.* At one extreme, emotion is repressed, controlled, or isolated so that no relevant emotion is felt or expressed as one communicates one's thoughts. The appearance is of someone who is calm, rational, and detached. Frequently, beneath the calm surface is the fear that if one feels or expresses one's emotions, they will get out of control and one will do something destructive, foolish, or humiliating. However, the lack of appropriate emotional expressiveness may seriously impair communication. The other may take your lack of emotion as an indicator that you have no real commitment to your interests and that you lack genuine concern for the other's interests. At the other extreme, there are some people who believe that only feelings are real and that words and ideas are not to be taken seriously unless they are thoroughly soaked in emotion. The emotional intensity of such people also interferes with communication. It impairs the ability to explore ideas mutually and to develop creative solutions to impasses; it also makes it difficult to differentiate the significant from the insignificant, if even the trivial is accompanied with intense emotion. The ideal mode of communication combines thought and affect: The thought is supported by the affect, and the affect is explained by the thought.

(e) *Escalating/minimizing.* At one extreme, there are people who tend to experience any given conflict in the largest possible terms. The issues are cast so that what is at stake involves one's self, one's family, one's ethnic group, precedence for all time, or the like. The specifics of the conflict get lost as it escalates along the various dimensions of conflict: the size and number of the immediate issues involved; the number of motives and participants implicated on each side of the issue; the size and number of the principles and precedents that are perceived to be at stake;

the cost that the participants are willing to bear in relation to the conflict; the number of norms of moral conduct from which behavior toward the other side is exempted; and the intensity of negative attitudes toward the other side. Escalation of the conflict makes the conflict more difficult to resolve constructively except when the escalation proceeds so rapidly that its absurdity becomes even self-apparent. At the other extreme, there are people who tend to minimize their conflicts. They are similar to the conflict avoiders but, unlike the avoiders, they do recognize the existence of the conflict. However, by minimizing the seriousness of the differences between self and other and by not recognizing how important the matter is to self and to the other, one can produce serious misunderstandings. One may also restrict the effort needed to resolve the conflict constructively.

(f) *Compulsively revealing/compulsively concealing.* At one extreme, there are people who feel a compulsion to reveal whatever they think and feel about the other, including their suspicions, hostilities, and fears, in the most blunt, unrationalized, and unmodulated manner. They may feel they have to communicate every doubt, sense of inadequacy, or weakness they have about themselves. At the other extreme, there are people who feel that they cannot reveal any of their feelings or thoughts without seriously damaging their relationship to the other. Either extreme can impair the development of a constructive relationship. One, in effect, should be open and honest in communication but realistically take into account the consequences of what one says or does not say and the current state of the relationship.

13. Finally, throughout conflict, you should remain a moral person who is caring and just and should consider the other as a member of your moral community, entitled to care and justice. In the heat of conflict, there is often the tendency to shrink one's moral community and to exclude the other from it: This permits

behavior toward the other that one would otherwise consider morally reprehensible. Such behavior escalates conflict and turns it in the direction of violence and destruction.

The foregoing elements could provide the basis for many different types of courses and workshops in conflict resolution in schools. My limited experience with such training suggests that, by itself, a simple course or workshop is not usually sufficient to produce lasting effects. Students must have repeated opportunities to practice their skills of constructive conflict resolution in a supportive atmosphere. The use of constructive controversy in teaching could provide such an atmosphere.

The Use of Constructive Controversy in Teaching Subject Matters

David Johnson and Roger Johnson (1987, 1992) of the University of Minnesota have suggested that teachers, no matter what subjects they teach, can stimulate and structure constructive controversy in the classroom that will promote academic learning and the development of conflict resolution skills. A cooperative context is established for a controversy, for example, by assigning students to groups of four, dividing each group into two pairs who are assigned positions on the topics to be discussed, and requiring each group to reach a consensus on the issue and turn in a group report on which all members will be evaluated. There are five phases involved in the structured controversy. First, the paired students learn their respective positions: then each pair presents its position. Next, there is an open discussion in which students argue strongly and persuasively for their positions. After this, there is a perspective reversal, in which each pair presents the opposing pair's position as sincerely and persuasively as it can. In the last phase, they drop their advocacy of their assigned positions and seek to reach consensus on a position that is supported by the evidence. In this phase, they write a joint statement with the rationale and supporting evidence for the synthesis their group has agreed on.

The discussion rules that the students are instructed to following during the controversy are (a) be critical of ideas, not people; (b) focus on making the best possible decision, not on winning; (c) encourage everyone to participate; (d) listen to everyone's ideas, even if you do not agree; (e) restate what someone has said if it is not clear; (f) bring out the ideas and facts supporting both sides and then try to put them together in a way that makes sense; (g) try to understand both sides of the issue; and (h) change your mind if the evidence clearly indicates that you should do so.

After the structured controversy, there is group processing and highlighting of the specific skills required for constructive controversy. There is good reason to believe that such structured controversy not only would make the classroom more interesting but would also promote the development of perspective taking, critical thinking, and other skills involved in constructive conflict resolution. However, as yet there has been little systematic research on structured controversy.

Mediation in the Schools

There are difficult conflicts that the disputing parties may not be able to resolve constructively without the help of third parties acting as mediators. In schools, such conflicts can occur between students, between students and teachers, between parents and teachers, and between teachers and administrators. To deal with such conflicts, mediation programs have been established in a number of schools. These programs vary, but typically students and teachers are given about 20 to 30 hours of training in the principles of constructive conflict resolution and specific training in how to serve as mediators. They are usually given a set of rules to apply during the mediation process. Students as young as 10 years old as well as high school and college students have been trained. Little systematic research on the effects of such programs has been done, but there is considerable anecdotal evidence to suggest that many student mediators have benefited

enormously and that incidents of school violence have decreased.

In selecting to emphasize cooperative learning, conflict resolution, structured controversy, and school mediation as the core of any comprehensive program for a peaceful world, I have been guided by the view that students need to have continuing experiences of constructive conflict resolution as they learn different subjects, as well as an immersion in a school environment that provides daily experiences (and a model) of cooperative relations and of constructive resolution of conflicts. This pervasive and extended experience, combined with tuition in the concepts and principles of cooperative work and of conflict resolution, should enable the students to develop generalizable attitudes and skills strong enough to resist the countervailing influences that are so prevalent in their nonschool environments. It is my hope that, by the time they become adults, they would have developed the attitudes, knowledge, and skills that would enable them to cooperate with others in resolving constructively the inevitable conflicts that will occur among and within nations, ethnic groups, communities, and families.

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VOLUNTARY STUDENT TRANSFER IN METROPOLITAN KANSAS CITY

Cross-District Research and Discovery: Sample Units and Projected Units

Multi-District Discovery Units

"Cooperative learning" is a crucial feature of the Voluntary Student Transfer project, a feature made possible as both distance learning and face-to-face learning by the universal use of electronic technology. Fundamental to it will be a new kind of educational literature and teaching approach: "Cross-District Research and Discovery Units."

These teaching/learning tools are like an old-style curriculum, providing structure and strategy for learning to unfold. They are also unique. The learning they facilitate will unite young scholar communities, across distances, in common inquiry, reflection and conclusion. Because this plan supports intermittant [sic] meetings in non-threatening environments with mentors and distant teammates, this way of learning will have prepared them to work seamlessly together on those occasions.

Section 1: Cross-District Discovery Unit Examples

To make full use of so many available electronic resources, and to support learner-centered education, these open-ended materials are organized around themes. In your preview material is a complete discovery unit sample, "A Dream of a Team", which, though extensive, only develops one part of the numerous possibilities of the theme TEAM.

In this case, TEAM is presented as a science-emphasis cluster around hypothesis testing, with features of computation, poetry, history, geography and current events. There could easily be literature and arts applications, as well as many others, all this

with the TEAM concept narrowly defined as "sports" and even more narrowly defined as "baseball." What are the possibilities for learning if the TEAM is from NASA, the TEAM is a family or the TEAM is a government entity? Thematic learning is limitless, layered for topic, depth and complexity. This is the reason it suits the new education so well.

A second example appears in your review materials from the Olin Environmental Project. Here, a manufacturer has funded creation of cross-district explorations by a cadre of teachers under the guidance of PEI, using Olin chemical engineers as mentor personnel. Already completed, with more being added, this shows a different application of discovery unit learning around the theme WATER.

Section 2: Projected Cross-District Discovery Units

Several projects are currently contributing new Cross District Discovery Units to the ShareNet "stable." Examples of current projects making contributions similar to the Olin materials include: The National Fish and Wildlife Agency project, the Jackson County Anti-Drug Tax project (developing prevention materials for access by the twelve county school districts and all other system users, which are ready to be incorporated into the "discovery format"), and the Oncology project with Independence Regional Health Center, providing cancer prevention lessons which can also be easily incorporated into discovery.

Further, PEI staff continually generate new theme possibilities, then seek a funding "home" for them so that they can become available for use in projects such as Voluntary Student Transfer. This section lists a few of those incipient cross-district discovery units.

Section 3: Statistical Data from ShareNet

Also included in these Cross-District "Research and Discovery" preview materials are samples of statistical information of the

type freely available from the ShareNet Telecommunications System. From these information bases students can develop specifics to inform their conclusions about, for example, the need for mass transit in the city (in Discovery Unit "People Moving") or the availability of affordable housing (in Discovery Unit "Shelter")

Studies under Consideration

Classroom Activities being considered for the Voluntary Desegration [sic] Classrooms —

Cultural Diversity

BALANCING UNIT AND DIVERSITY

Our study of cultural diversity begins with ourselves and our families. Some of us may feel that "we" are just plain Americans and that we have no distinct heritage. This suit explores how all of us have been influenced by beliefs, customs, and expectations which come from national, racial, or religious groups. Culture and ethnicity influence our language, food, society, and family relationships. Even those of us who do not identify with an ethnic background, are part of the American heritage that has been shaped and influenced by Native Americans and immigrants from diverse cultures.

Study Questions:

What is meant by "unity" with respect to humanity? What is meant by "diversity" with respect to humanity?

What factors tend to separate humans into different groups and therefore reveal our diversity?

What factors tend to bring humans together for common purposes and therefore reveal our unity?

What are some possible advantages of cultural and physical diversity in human populations? What are some possible disadvantages or dangers?

How have immigration patterns and laws affected the changing population mix in the United States?

Discuss the prime example of forced immigration in the United States and how it has affected our history and development?

Activities include:

Ethnic perceptions and Identity modules — Students discuss/ write to what extent they are familiar with their own ethnic history. Students will interview family members generating more information and background. The students will write personal profiles and on ShareNet, publish electronically for peer review. When the identity modules are presented students from the participating classrooms will form "new interdistrict groups". These new groups will note the similarities and differences of their members. Students will write about this activity for a news release.

Solving Human Problems

KNOWLEDGE IS POWER IN PROBLEM-SOLVING

Statistical Information – Missouri County Profiles — Students will use resources, learning to read the census data and apply the information to future studies or metropolitan problem solving activities. Unit themes may include:

1. Feasibility study for a metropolitan mass transit system
2. A study of Metropolitan Water Resources and their community impact —
   Supported by student recommendations based on findings.
3. Applying statistics to community crime related problems. These Show Me Scholars Teams will work collaboratively with their local fire and police to determine
4. Do cultural and leisure resources adequately reflect the racial and ethnic make-up of the area?

Global and Ecological Issues

KIDS CAN MAKE A DIFFERENCE

Some of the "Kids Can Make a Difference" project activities will include:

1. "A World Map-A-Thon" Cross District Activities

   Students will study for a world map-a-thon. In addition to naming countries, they will identify approximate grid coordinates, gross national products and other pertinent information. This activity will be conducted electronically and a point system for correct scores will be established.

2. School Grounds and Surrounding Areas Environmental Clean-Up

   All classes will be assigned a particular area for clean-up duty. The students' goal will be to make area litter-free. As a group they will examine the collections and observe the social influences that they determine to be contributing factors. Students will make policy recommendations for business, personal, and community consideration. Each participating group will exchange information on ShareNet and formulate presentation agendas for their respective communities. These classrooms will share their findings with other school communities on a global scale.

   Mentors on-line:

   - one former member of the Peace Corps
   - environmental engineer
   - waste management representatives
   - environmental resource experts

A film called "Mother Earth is Dying" featuring Bette Midler will be shown during these studies.

A forum devoted to Environmental Problem Solving will be set up.

Adapted From:
CAROL HOCHMAN Boyce Middle School
Upper St. Clair, Pennsylvania

Literature Review

Classes of students will begin with a short story unit using a story called "correspondence". Pen pals is the central theme of the story. This will help students to understand the concept, provide and stimulate ideas for them to begin the "sharing process" electronically. Their first "pen pal" exercise will be to create personal profiles and sent to their respective pals. These will be followed by reading and exchanges on the following works, The Pigman; The Odyssey; Of Mice and Men; Romeo and Juliet.

Cross District Discovery Unit For Voluntary Student Transfer

Title: "A Dream of A Team"

Grade Level: 6

Hypothesis Applications

Background:

1) Students will need to know basic statistical methods for graphing and analysis of data.

2) Lessons designed to introduce the students to these ideas are included in the PROCEDURE section.

3) Other basic lesson titles already on ShareNet and the topics they introduce are:

a) "Test Scores" → Mean, Median, and Mode

b) "Breakfast Cereals" → Range, Quartiles, Interquartile Range, and Outliers

c) "TV Ratings" → Box and Whisker Plots

d) "Ages of Presidents at Their Deaths" → Stem and Leaf Plots

e) "Home Run Leaders" → Back to Back Stem and Leaf Plots

f) "Tall Buildings" → Stem and Leaf Plots where Data Should be Truncated or Rounded

4) A published source for excellent beginning lessons in statistical graphing and data analysis is the Dale Seymour publication, Exploring Data, by Landwehr and Watkin

Outcome: Students will be able to:

- Use the scientific method to test an hypothesis.
- Gather and analyze data to evaluate the hypothesis.
- Make decisions involving money transactions in buying a team and keeping related records.
- Telecommunicate via ShareNet in order to gather data and communicate their findings to other participating schools, and to communicate with a statistical or sports mentor.

Standards Met:

NCTM: 1 - Mathematics as Problem Solving

2 - Mathematics as Communication

3 - Mathematics as Reasoning

4 - Mathematical Connections

7 - Computation and Estimation

10 - Statistics

KMCS: Same as above.

MMAT:

5-A1 - Communicate and interpret numbers.

5-A5 - Represent and describe mathematical relationships.

5-F2 - Construct, read, and interpret displays of data.

5-H1 - Solve problems involving money management.

6-F1 - Construct and interpret graphs and tables.

6-F4 - Find a mean.

7-A1 - Communicate and interpret numbers.

7-A5 - Use numerical relationships to describe and simplify numerical situations.

7-F1 - Systematically collect, organize, and classify data.

7-F2 - Construct, read, and interpret displays of data.

7-F3 - Formulate and solve problems that involve collecting and analyzing data.

8-A1 - Same as 7-A1.

8-A5 - Same as 7-A5.

8-F4 - Same as 7-F3.

8-G4 - Follow a series of instructions in sequential order.

Introduction

Teachers,

Welcome to Share Net's Cross District discovery unit,

"A Dream of a Team"

which is designed to be used by a teacher who has no experience with teaching statistics as well as the statistical veteran.

Using data on approximately 150 baseball cards supplied to you by Pan Ed, your students are going to buy a team, make hypotheses, gather data within their own groups and class, assimilate, graph, and analyze the data, and use the analysis to evaluate their hypotheses.

Then, via Share Net, they will share their findings and data with the other schools involved in the project, compare their own conclusions with those made by students in the other schools, assimilate and organize the large collection of data and use it to analyze their hypotheses again.

Your students will have the opportunity to "buy" players from other schools in an attempt to build a Dream Team - 11 positions, and track the financial activities that are involved. The most complete team(s) will receive a prize on the last day of the exercise. All students will be rewarded for their participation with a special gift the last day of the exercise.

Your students will be computing, communicating both orally and in writing, be involved with technology through telecommunications, and have the opportunity to relate to the world at large by buying a team and by contacting mentors.

Please remember that all questions in the discussions are intended to be guidelines only. Let your creativity reign. Be sure to put all of your related Data on the system for comparative analysis.

Thanks for participating, and may your baseball team buying, statistics, and telecommunications experience be a memorable one for you and your students.

Wishing you success,

Pan Ed and Share Net

Preparation:

- In December, sign up to be a part of the Cross District Discovery Unit through Share Net.
- Download the lessons you need to prepare yourself and/or your students in basic statistical methods.
- Incorporate into your daily plans enough time to prepare your students with Share Net statistical activities or other activities of your choice.
- Download all lessons for the unit and, if needed, other statistics lessons listed in BACKGROUND.
- Acquire from Pan Ed:
    1) your collection of baseball cards,
    2) the list of participating schools with user names which will be posted for the duration of the unit.
    3) An enlarged copy of two baseball cards to be use [sic] the classroom introduction.
    4) Play money.
- Download the evaluation form which is to be kept in mind during the activity, completed afterwards, and returned to Pan Ed (Share Net). The Fax Number is 461-0201.

- Make a transparency of two enlarged baseball cards.
- Time Frame → You will need:
    * Approximately 1 week previous to the Cross District Activities to prepare students for basis statistical graphing and analysis methods if they have had little or no experience with that kind of mathematics.
    * 5 - 6 weeks (2-3 sessions per week) to accomplish the Cross District sharing data activities.

CLASSROOM INTRODUCTION

To be done 1 or 2 days before Block 1 of the sharing data activities unless your students need work on basic statistical graphing and analysis. If your students do need basic work, begin this introduction 5 - 6 class days before starting Block 1.

1) Establish groups and explain the overall activity. (See write up following this introduction and the statement about demonstrating Share Net and Groliers.)
2) Have students discuss within their groups the possibility of acquiring their own baseball team and bring the discussion together for the whole class.

    Ideas: What would be needed?

    Money, Capabilities, Knowledge, Training, Experience

    How could you find out how to get started?

    Read, Library resources, MENTORS.

    How would you find team members?

    Read, attend games, have scouts, know players.

What else would you need?

Coaching staff, playing facilities, business managers.

3) Have students write (possibly at home) a statement about how they will go about acquiring a baseball team of their own and seal it in an envelope. Save these for future use.

4) OPTIONAL AT THIS POINT - Demo SHARE NET and print out Grolier's history of Baseball. Briefly discuss the history. (See the section on notes to the teacher.)

5) Make a chart of teams in each major league which will be passed throughout the coming weeks.

6) Show list of participating schools and have students help you prepare a description of themselves as a group and a welcome statement to be telecommunicated to the other schools and

Mentors.

7) Discuss card information with enlargements displayed on an overhead projector.

   (a) What does each abbreviation mean? (Pitchers, Nonpitchers)

   (b) Which numbers are counted values, computed values?

   (c) Discuss how the computed values are done. (Allow students who are baseball experts to explain this.)

   Do an example BA and ERA

Write the formulas on a chart to be posted in room.

Batting Average	*Earned Run Average
BA = H/AB	*ERA = ER/(TP/9)

Basic Statistical Methods 2

Histogram

1) Have each group sort their players by weight category as listed below, by league, and record the information on their charts. (Keep track of lowest and highest weight among all weights.)

weight is between	number of players Am. L	Nat. L	total
150-159	____	____	____
160-169	____	____	____
170-179	____	____	____
180-189	____	____	____
190-199	____	____	____
200-209	____	____	____
210-219	____	____	____

2) Have a member of each group announce their totals so you can compute a grand total for a board chart that is like their charts.

3) Make a HISTOGRAM (bar graph) using the board chart totals. Use two colors, one for each league. (Make this on large paper - possibly newsprint - to be preserved for room display.) (Students do this also on their templates.)

(Use (max - min)/10 to compute approximate vertical scale for graphing. Use common sense also. Consider: What scale will give an accurate and quick picture of the data? What scale will help make the graph aesthetically pleasant?)

4) Discussion:

   a. If all the bars of one color on the Histogram were stacked on top of each other how high would the graph be? (Ans. a number = the total number of players we have from one league.)

   b. What percent would that tall bar represent? (Ans. 100%) Ask 100% of what?

   c. Then what percent will each of the bars on our histogram represent? How would you compute those? (Ans. each bar height divided by the total number of players and the decimal converted to a percent.)

   d. Have students compute percents and record them on the histogram bars as they are computed. (Students record these on their templates.)

   e. What would all this data look like on a LINE PLOT?

      (Ans. Very much like the histogram but without bars.)

   f. Which kind of graph is best for this much data? (Ans. Histogram. But, discuss the possibility of using a LINE PLOT if someone suggests that as best. Try to show that the LINE PLOT is best for a small amount of data while the HISTOGRAM is o.k. for lots of data because it would take a long time to make all those x's on the Line Plot and the

final product would not be as neat and easy to read as the HISTOGRAM.)

   g. From this plot, can you tell Smallest weight? Largest weight? Why or Why not?

   h. Can you tell anything about MOST of the players? What?

      Can you tell anything about SOME of the players? What?

   i. What titles and explanations do we the graph [sic] to make sure people can tell what it is all about when they read it? Do these titles on the HISTOGRAM.

5) Have each group deal out their cards and each group member convert height to inches for his/her players.

6) Have each person compute average height for his/her players.

7) Assimilate all data in a histogram comparing the total numbers with average height. (Heights along the horizontal axis, numbers on the vertical axis.)

8) Evaluate the graph with a discussion similar to 4) discussion, e - i and include:

   a. Use the histogram to determine the MEDIAN average height. (Half of the data entries on each side of it.)

   b. Average all the individually computed average heights to determine the MEAN height.

   c. Compare MEDIAN and MEAN. If nearly the same discuss why:

(Items in the histogram are very similar, closely grouped, or the outlier, if any, are balanced.) If very (or somewhat) different, discuss why: (Outliers on one end will influence the MEAN but not the MEDIAN.)

9) Conclusions:

   * HISTOGRAMS are good for larger amounts of data (more that (sic)25 items).
   * They show percents easily.
   * They can be read quickly and easily by height.

10) Write: A brief description of what the Histograms say about weight and height. Talk about each graph separately. Keep in mind the ideas we have discussed.

11) OPTION TO SEND: If you wish, another message to the other participating schools.

Basic Statistical Methods 3

STEM AND LEAF PLOT

1) Have groups deal their cards out to their group members.

2) Have each group member sort by league and report the weights on their cards as you (and students on templates) record them on a back-to-back stem and leaf plot. (You might need to explain how to decide the numbers that go in the stem and whether they should be separated by 10 or by 5.)

Sample Plot:

AmericanLeague NationalLeague

100 pounds plus:_____

6 5 9 . 5 5 6 8

9 4 9 0 4 3 1

8 7 6 6 5 . 8 7 9 5 7

2 4 3 0 8 4 3 3

6 5 7 . 9 9 6 7 5 8

0 2 7 4 4 3

9 8 8 5 7 6 8 . 9

2 3 1 0 6 1 0

8 8 5 . 7 8 6

0 5 4 3

3) Rewrite the stem plot so data items will be in order with the smallest value on each leaf near the stem.

4) Discussion:

   a. Which league has the most number of players weighing more than 170 pounds? How did you decide that?
   b. Which league has the lightest player? How can you tell? The heaviest? How again?
   c. Which weight division has the most number of players who weigh the same amount? How did you decide?

d. For each league, half of the players weigh above what weight? How can you tell?

e. What is the median weight for each league? What is the Mean weight? (average) What is the range of the weights?

f. How are the two leagues alike or different by weight? Why do you think so?

g. Are there any outliers or gaps? How can you tell?

h. How is this graph useful in comparison to the Histogram and Line Plot?

(Good for a larger set of data than one would use on a Line Plot. Shows actual weights for individuals rather that [sic] at total like the Histogram.)

i. Is either set of data symmetrical (balanced around central point)?

j. Does either set of data have any other noticeable shape? (Centered? Heavy at one or both ends? Very uneven, One mound, Two mounds, J shaped, U shaped, Rectangular? etc.) What do you think is the reason for this?

k. Special entries on a Stem and Leaf can be labeled along the side and indicated with arrows. Read the back of some of your cards and tell me something REALLY SPECIAL about one of your players. We will indicate that beside his weight.

5) Conclusion: Ask for student generalizations, but infuse as many of the following as you can:

The Stem and Leaf Plot delivers more information than the Line Plot or the Histogram.

Good for more than 25 data items.

Quick way to organize and display data.

Makes it easy to identify:

largest and smallest values

outliers

clusters

gaps

shape of the distribution

relative position of important values

6) Write: a brief comparison of the two leagues according to the information the Stem and Leaf Plot gives you. (Keep in mind the ideas we have discussed.

SCATTER PLOT

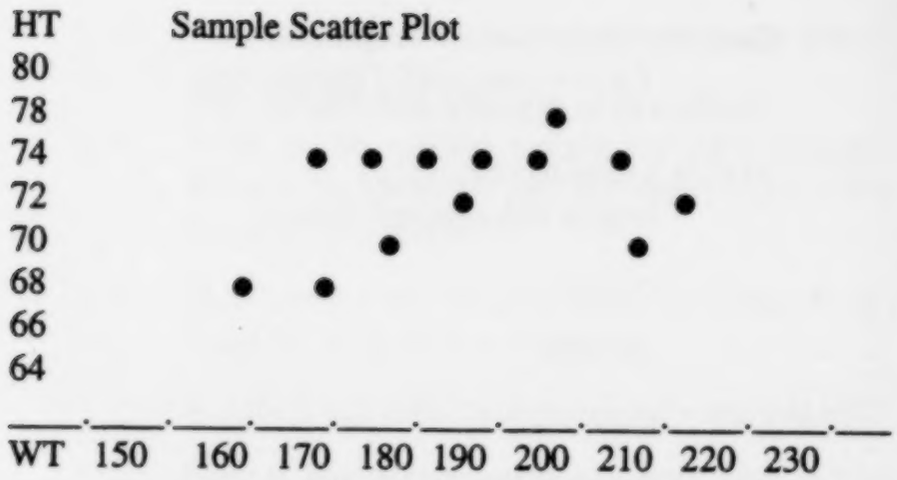
1) Have students convert each height on their cards to inches.

2) Have students make a chart listing weight and height for each player in their group.

3) Use (Maximum - Minimum)/10 - approximate - to determine graphing scales.

4) Using one group's data as an example, make a scatter plot of the data points while each group does their own graph.

Note: A letter to represent either the American or National leagues could be used on the graph in place of each dot.



5) Questions:

a. Which height goes with the heaviest weight? Lightest weight?

b. Which weight goes with the greatest height? Smallest height?

c. Is the heaviest person also the tallest? The lightest person the shortest? Would you expect the values to match that way? Why? or Why not?

d. Is there a positive correlation? (The points making an upward trend to the right.) A negative correlation? (The points making a downward trend to the right.) No correlation? What do you think causes it?

e. Are there any points that do not follow the general pattern (when there is a general pattern)?

f. Are there any noticeable clusters of points? What would cause them to happen?

g. Are there any points noticeably higher or lower than most? What would cause that to happen?

h. Try to fit a line through the points that is [sic] close to as many points as possible and splits all the points in half (as many on one side of the line as are on the other side).

i. Use this line to predict the expected height of a player that weighs 165 lbs (or some number of pounds you select that is nor [sic] currently plotted on the graph).

j. Convert your own height to inches. Do you fit on this "best fit" line? Why or Why not?

k. How would it work to put this data in a LinePlot, Histogram, Stem and Leaf plot?
(they are all ONE-VARIABLE graphing methods. They could be used to show HOW MANY players are a certain weight or height or how many are within an interval.)

6) Conclusion: Honor all student input, but try to include as much of the following as possible.

* Scatter plots are a good method for graphing data consisting of two numbers for each entry.
* It is a TWO-VARIABLE graphing method.
* Lowest and highest values are quickly accessible.
* Trends (or NONE) are noticeable.
* A general trend allows one to fit a line to he [sic] data.
* Predictions can be made using the fitted line.
* Comparisons can be made by using letters instead of dots.

7) Write: A brief description of what the graphs says to compare weights with heights. Keep in mind the ideas we have discussed.

Block 1 - Lesson 1

(Note to the teacher: There is lots to do here. Decide early how many days you will need.)

1) Retrieve:

→ Data: From each school:

Total number of Boys and Girls in the class.

Total number of Boys and Girls who collect baseball cards.

→ Messages from other schools.

→ Replies from mentors.

Distribute messages to various class members and ask them to read them to the class.

2) Establish groups which will be maintained for each lesson in this continued project.

3) Use the retrieved data on Boys and Girls to make Line Plot showing the number reported by each school including your own. Instead of an x, use a G for girls and B for boys. List the data from each school on the board.

Sample Plot

```
                B G   B   G
G     G         G B B B G B B
-------------------------------------------------------
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19
```


a) Compute the Mean number of Students who collect cards.

b) Determine the Median number of students (Boys) (Girls) who collect cards.

c) What does the graph tell us about the number of students who collect cards?

d) Questions and discussion similar to Classroom Introduction #6, c.

4) Explain the additional material you will be telecommunicating.

"**You will send BUY REQUESTS to the first 3 schools named after you in the list of participating schools. For each succeeding block of lessons, you will move ahead 3 more schools in the list, continuing to cycle through the lit until you return to your own name."

"**You may send MESSAGES by individual, group, or class to all or some schools."

5) Explain templates and charts for keeping records.

6) Distribute baseball cards and 4 envelopes per group for sorting: Am League, pitchers, non pitchers Nat Leagues, pitchers, non pitchers.

7) Have groups deal out their cards so each member has the same number (being one short or long will not matter).

8) Have each student use the averaging formulas to verify the total BA or ERA for each of their cards. (CALCULATORS) The ERA formula will not yield the exact decimal that is on the card, but, it should be close.

9) Ask each group to collaborate in making a chart of the total number of players they have for each Baseball Game POSITION for EACH LEAGUE.

10) On a large chart, bring together all of their totals in order to compute grand totals for each POSITION within EACH LEAGUE.

11) Explain that this is the data we will send to all the other schools and will receive from each of them their totals.

12) Have each group decide on the Dream Team they wish to "ACQUIRE" during the weeks of this project. The price of a player is $1000 the first week. The price goes up $100 per week for the remaining weeks.

13) OPTION: Make suggestios for the students to consider in acquiring a team or let them make strategies [sic] of their own. Keep in mind the advantage of:

    a. having no duplicate choices in the room.

    b. noticing Buy Requests as they come in and using that information to decide during the next lesson if you want to stay with your choice. (No changes thereafter.)

    c. choosing a team for which you already have several players.

14) Have each group decide what its first BUY REQUESTS will be. (From each group, send 1 request to each of the 3 next schools on the list — total = numbers of groups x 3.)

15) Distribute $10,000, ENVELOPES, and BUY REQUEST FORMS to each group and have groups fill out the forms, attach the needed $1000-$3000, put them in the envelope, and turn them in.

16) Get student input to determine what question, if any, should go to the Mentor, and what messages should be sent to the other schools. 16) SEND: → Data - Classroom totals for positions for each league.
    → Buy Requests - numbered in order of submission.
    → Questions for Mentors.
    → Messages.

Block 1 - Lesson 2

1) Retrieve:
    → Data - Classroom totals for each league.
    → Buy requests from other schools.
    → Mentor replies.
    → Messages

2) Distribute other schools' data to your groups so they can report it to you for display.

3) Make a large chart on NEWSPRINT showing position names across the top and school names down the side (include your own school). Ask groups for the totals from other schools, enter them in the chart and have students total each position and write the totals on the chart. Preserve this for long term display. (Numbers will change as Buy Requests are fulfilled.)

4) Discussion:

    1. Which position has the least number of players? Which position shows the most number of players? Is that comparison really true in baseball teams that you know about? Why? or Why not?

2. Which school has the most players in the positions you need? Will that help you decide what to request from a particular school?

3. Explain that the chart of schools and positions will be updated each time we complete buys so we will have a little knowledge about what the other schools have available.

OPTION: Go to number 9 if you are short on time.

5) Use the totals to compute percent of all players there are in each position.

6) Make a histogram comparing position with percent.

7) Discussion: (Honor all reasonable input. Attempt to "air" as much about baseball in general as possible. Encourage all to participate.)

1. Which gives us the most immediate information, the Histogram or the chart? Why?

2. Are you wishing you had more information? Why? or Why not?

3. Would it have been better to graph this data some other way? How? and Why?

4. What specific information can you get from each display?

8) Write: A brief description of what information the Histogram gives us. Keep in mind the ideas we discussed.

9) Announce Buy Requests from other schools. Give single requests, with money attached, to the group that has the team and position requested. Have that group

fill out a Verification Form, update their Balance Sheets, and update the big chart of positions available.

10) Distribute messages and have students write replies.

11) Determine what questions will go to Mentors and what messages will go to schools.

12) SEND
- → Verification of other schools' Buys.
- → Questions to Mentors.
- → Messages.

Block 2 - Lesson 1 Hypothesis Testing

1) Retrieve
- → Verification of your own Buys.
- → Replies from Mentors.
- → Messages.

2) Have students take out only the non-pitcher cards for each league. (Leagues can be mixed for this activity.)

3) Ask students to discuss their players with their group members in light of the hypothesis:

"Heavier players get more hits per year."

4) Each group must decide to agree or disagree with the hypothesis and make a record of their decision on their templates.

5) Each group will compute the average number of hits per year for each player they have a card for and record this information in a chart.

6) Ascertain the lowest and highest computation by asking groups and keeping lowest/highest recorded [sic]

on board. Use this to compute approximate scale for graph. (Horizontal scale approximately 150 through 210 pounds - 5 or 10 pound intervals. Vertical scale zero through maximum number of hits - 2 hit intervals.

7) Gather all computed data from groups and make a chart on newsprint for all to see.

8) Have half the room make a scatter plot on their templates, the other half make a histogram. Both will use the data gathered in #7. One group in each half will make a copy of their graph on a transparent sheet.

9) Display both graphs and discuss their usefulness.

10) Discussion:

   a. What is the largest number of hits?

   b. How heavy is the player who achieved that?

   c. Is this the heaviest player?

   d. Which graph is more meaningful to you?

   e. Does the Scatter Plot have a pattern to it? Explain.

   f. Does either graph support or negate theoriginal [sic] hypothesis?

   g. Were we right or wrong? Is there a "correct" answer?

   h. Does the scatter plot have a steady change? rising, falling, staying the same? Are there any clustered points? What would cause that? Are there any outliers? Why? What would cause them to be there. [sic]

   i. If you were hiring baseball players for a team, would you compare weights? Why or Why not? What characteristics would you look for? Why?

   j. Write: "My group decided the original hypothesis was (correct, incorrect) because . . .

   After studying the graphs, I think we (were right, were wrong) because . . ."

11) Collect from each group: (largest average number of hits, weight)

12) Have each group decide what position(s) and for whatteam [sic] they want to make a "buy". Have them fill out BuyRequest [sic] Forms to be turned in.

13) Update charts and Balance Sheets

14) Determine Mentor Questions and Messages to be sent.

15) SEND
   → Data: from number 11 (a pair of numbers from each group in the class)
   → Buy Requests: from number 12.
   → Questions to Mentors.
   → Messages.

Block 2 - Lesson 2

Hypothesis testing with a larger collection of data.

1) Retrieve
   → Data - Largest average number of hits, weight.
   → Buy requests.
   → Messages.

2) Do class graphs (scatter plot and histogram again) on retrieved data: Largest number of hits vs weight.

3) Discussion:

   a. Are the plots similar to or different than the ones done with just our own data? In what way are they (similar, different)? Why?

   b. Do we have more or less information now? Why do you think so?

   c. What would you decide about our original hypothesis by looking at these graphs? Why?

   d. What factors affect the NUMBER of hits a baseball player gets? How do you know this? How does that affect the average?

   e. Why did we not keep the pitchers in our analysis? Should we have kept them in the analysis? Why or Why not?

   f. If we did keep the pitchers in, how would the data display be different than it is now? Explain why.

   g. Do you think there would be any relationship between height and number of hits? How could you find out?

   h. Write: Briefly explain whether or not the new data made a difference in our deciding if the hypothesis was correct.

4) Announce Buy Requests. If there are matches (by team name and position played) have groups fill out a Verification Form to O.K. the Buy and Price and record the sale on their Balance Sheets. (If more than one group has a match, one can offer a lower price, or

they could flip a coin to decide who sells.) Update the totals chart.

5) Have groups up-date their Team Record and Balance Sheets.

6) Determine questions for Mentors and Messages.

7) SEND
   → Verification of other schools' Buys.
   → Questions to Mentors.
   → Messages.

Block 3 - Lesson 1

1) Retrieve
   → Verification of your own Buys.
   → Mentor replies.
   → Messages.

2) Have groups look at their cards and compare player positions with number of hits per year. (Number of hits per year will have to be computed for pitchers.)

3) Each group will decide which position they think should be stated in the hypothesis:

   Hypothesis: _____ (position) _____ players get the most hits per year. [sic] and record the hypothesis on their templates.

4) Each group will deal their cards into two piles, form partnerships in the group, and each pair of partners will record data from their cards.

11 Positions number of hits per year TOTALS Average

RP
P
C
1B
2B
3B
SS
RF
LF
CF

(This could be done for each league separately if you prefer.)

5) Make a large chart on newsprint that is like the chart students have made and record classroom totals on it.

6) Discussion: (Encourage and respect student input.)

   a. Are there any surprising totals? What? Why? Do we have the same number of players in each position? Is this a "fair" comparison of data? Why? Will data from the other schools increase or decrease the validity of our comparison? Why?

   b. Are there very small or very large totals that you expected? What? Why?

   c. To compare these in a graph, should we use totals? Averages? Why? Why not?

   d. If we are going to graph this, what type of graph should we use? Why?

   e. Make a large Histogram on newsprint using totals from 4. Students do the same on * * *

7) Have each group decide on Buy requests, turn in forms, and up-date their Team Records and Balance sheets.

8) Determine Mentor Questions and Messages.

9) SEND
   - → Data - Position and Total hits.
   - → Questions to Mentors.
   - → Buy requests.
   - → Messages.

Block 3 - Lesson 2

Hypothesis testing with more data

1) Retrieve
   - → Data - Position and Total hits.
   - → Buy requests.
   - → Messages.
   - → Mentor replies.

2) Distribute retrieved data on Position and Total Hits to groups. Have them announce totals for each position while you (or a student helper) writes them in a chart on newsprint.

3) Have groups make a Histogram to display the data. You make a newsprint model also.

4) Discussion:

   a. Compare this Histogram to the class Histogram from Block 3 - Lesson 1.

b. What are the differences? What caused the differences? What are the similarities? Why would they stay similar?

c. Are there some positions we should have left out? Should the data be separated by league? Why or Why not?

d. Is this the best way to compare hits? Why or why not?

e. How else could we compare hits?

f. What would be the best way to compare hits? Why?

5) Write: A brief description of the best way to compare hits for many players and the most interesting way to compare hits for a few players. Talk it over with your group members first.

6) Have students prepare verification forms and update their Balance Sheets? Circulate to check on accurate recordkeeping and discus progress (or lack of it) in building a complete team. Suggest that keeping track of what position they have asked for from a particular school will help them decide what to ask for next.

7) Determine questions for Mentors and Messages.

8) Send
   - → Verification of other schools' Buy requests.
   - → Messages.
   - → Questions to Mentors.

Block 4 - Lesson 1

Hypothesis Testing

1) Retrieve
   - → Verification of your Buy requests.
   - → Messages.
   - → Mentor replies.

2) Have groups look over cards and decide how they will complete the hypothesis.

   HYPOTHESIS: Most baseball players come from _____.

   Choices: West, Central, South, Northeast

   or N. West, S. West, W. Central, E. Central [sic] S. Central, N. East, S. East.

3) Have each group put a circle sticker on the state each of their players is from and transfer that information to a large map at the front of the room. Before putting a sticker on, write the abbreviation for the players [sic] position on it. Note: At this time your students might be interested in hypothesizing relationships other that [sic] the one proposed. A record of these could be kept and discussed after all data has been processed.

4) Count totals by region and record them on a chart (students do so also on template.)

5) Discussion:

   a. Which state produced the most players?

   b. What might be some reasons for that?
      Population
      Age of state

Length of time baseball has been played there

Ongoing interest in baseball

Type of economy (time to support baseball)

Influence generated by the number of known teams in the area.

Etc.???

c. Use the larger regions, W, C, S, and N.E. What % of the players are from each region? Compute percents and record them on the template.

d. Besides a Histogram, percents can be displayed by using a circle graph. Have students compute the angle size needed to display these percents in a circle graph. Make the circle graph carefully using a protractor.

* * *

f. How else could we display this data graphically? (Try to use a graph other than the Histogram which has already been used a couple of times.)

g. Could we use a modified line plot? Let's try one but with Regions rather than numbers on the horizontal axis.

(Each x will represent some multiple otherwise there will be too many x's to use this type of graph.)

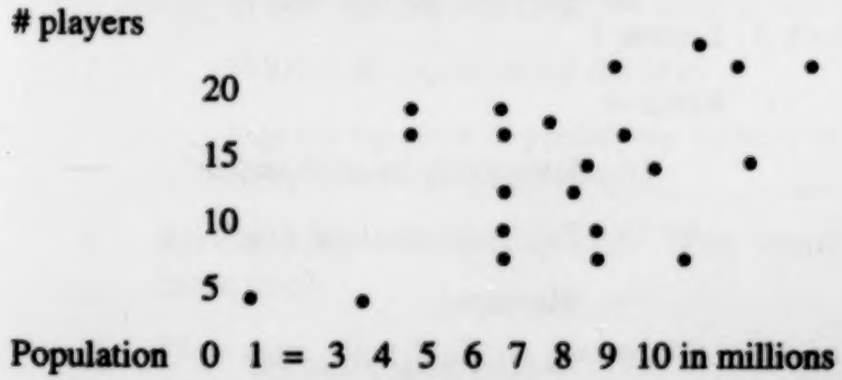
	x					
	x				x	
x	x	x		x	x	
x	x	x	x	x	x	x
x	x	x	x	x	x	x
N.W.	S.W.	N.W.C.	S.C.	N.E.C.	N.E.	S.E.

h. What advantages (disadvantages) does this graph have in comparison to the others we have made?

6) Have students look up population by region, record the total outside the border of each region on the map.

7) Have students compute total population by region, record the total outside the border of each region on the map.

8) Use population totals and player totals for each region to make a scatter plot. (computer approximate graphing [illegible] according to data gathered) There will be 7 pairs of numbers from each group.



9) Discussion:

   a. Which method better displays the relationship of players to region? Why?

   b. Are there any clusters of points? What would cause that?

   c. Is there a general pattern noticeable? Why would that happen. If there is a general pattern, are there any points that do not follow that pattern. What would cause that to happen.

   d. Would it be helpful to have more data? Why?

10) Have students up-date their Team Records and Balance Sheets, and each group decide on Buy Requests.

11) Determine Questions for mentors, and Messages to besent [sic].

12) Send

   → Data totals for each region.

   → Buy requests for team members.

   → Messages.

   → Questions to Mentors.

Block 4 - Lesson 2

1) Retrieve

   → Data totals for each region.

   → Buy requests (Last time!)

   → Messages.

   → Replies from Mentors.

2) Have students use all data to make a scatter plot similar to the plot made the previous day.

   Note: If students ask why we don't connect the dots, explain that is not done unless a comparison is being made according to time (years, days, months, ages [sic] etc.) in order to show a trend over a certain period of time.

3) Discussion:

   a. Do the points follow any general pattern? What would cause it?

   b. Could a "best fit" line be placed somewhat through thE [sic] "middle" of the data? (Make a slanted line close to as many points as possible with half the data on each side of the line.)

   c. Use this line to predict the number of ball players we could expect from a population of _____ (your number choice).

   d. What is the slope of the line? (rise/run)

   e. These questions are for students who know some Algebra.

      - Where will the line cross the vertical axis?

      - What is the equation for the line?

      - Use the equation to predict the number of ball players if the population is _____.

   f. Are there any clusters of points? What would cause that?

   g. Were there some duplicate data entries to put on the graph? How could we show that. (Ans. Put a number instead of a dot on the graph.)

4) Write: First discuss this with your partner and then, write a brief explanation of what the data says about population compared to number of players.

5) Write a brief statement of your initial hypothesis and whether it has been validated or negated. Be sure to explain why.

6) Have students prepare verification forms and update their records.

7) Determine questions for Mentors and Messages.

8) Send
   - → Verifications of other schools' Buy Requests.
   - → Messages.
   - → Questions to Mentors.

Block 5 - Lesson 1

Hypothesis testing

1) Retrieve
   - → Verification of your Buy Requests (Last time!).
   - → Messages.
   - → Replies from Mentors.

2) Ask groups to examine their cards and have each class member predict the following hypothesis related to his/her own birthday.

   Hypothesis: (Number) baseball players were the [sic] born in the same month as I.

3) Each class member will write his/her name on a birthday sticker and glue it to the calendar on his/her birthday.

4) Have groups total the number of players they have who were born in each month of the year and make a chart of that information.

5) Ask each group for their totals per month as you (or a student) make a chalkboard chart of grand totals for the class.

6) Have each class member make a Histogram of the totals as you make the same histogram on newsprint. Then ask each person to use his/her favorite color to highlight the bar that represents his/her birth month.

7) Each group will deal out their cards. Each group member will put an X on the calendar date for each of the players they have.

8) Discussion:

   a. Which month has the most birthdays? Least? Is that easy to tell from the calendar X's?

   b. What percent of all the players have a birthday in January? March? July?

   c. Do any months have the same number of player birthdays?

   d. Does any month have no player birthdays?

   e. Is there an overall pattern to the graph? Why or why not? Would you expect to see a pattern if we had more ball player birthdays? Why or Why not?

f. Who, in the class, shares a birthday month with more than 10 players? Less than 10 but more than 5? Less than 5 but more than 1? Less than 1???

g. What is the mean number of birthdays per month.

h. What is the median number of birthdays per month. Is that value visible from the graph? What kind of graph would make the median easily visible?

i. Could we have used a different kind of graph for this information? Which kind would you recommend? Why?

j. How close was your hypothesis to our actual count?

k. Make a similar hypothesis about the total data we will get from the other schools (plus our own). Remember there will be an approximate total of _____ baseball players to consider.

9) Write: A brief statement describing what the graph tells us about player birthdays. Keep in mind the ideas we have discussed.

10) Have groups up-date their Team Record and Balance Sheet.

11) Determine questions to Mentors and Messages.

12) Send
- → Data Totals on birthdays per month.
- → Messages.
- → Questions to Mentors.

Block 5 - Lesson 2

Hypothesis Testing with more data.

1) Retrieve
- → Data Totals on birthdays per month.
- → Messages
- → Replies from Mentors.

2) Distribute data totals from different schools to your groups and ask them to announce totals so you can consolidate all data into grand totals for graphing.

3) Have each student make a Histogram showing the totals as you (or a student) make(s) the same Histogram on newsprint. Ask each person to color in his/her birth month bar.

4) Discussion:

a. Is this histogram like or not like the one we did with our own data? What details are different? Why?

b. Use the suggestions for discussion (1 - 10) from Block 5 - Lesson 1.

5) Compute percent of player birthdays per month and make a circle graph using the percents?

6) Compute percent of classroom birthdays per month.

7) Make a back to back stem and leaf plot comparing class percents with player percents.

8) Discuss similarities and dissimilarities and reasons.

9) Use birthdays for Royals team members to make a reminder calendar for sending birthday cards. (The calendars and cards can be computer generated.)

10) Update Team Record and Balance sheets.

11) Distribute prizes for completed teams (or most near completion) AND highest money balance.

12) Ask your Royals person to autograph and distribute baseballs to all participants.

13) Send → Farewell and thank you to each schools' students and teachers and to Mentors.

Follow-up

1) Ask students to recall what they wrote the first day about how they would acquire a baseball team.

2) Ask if they think they would write them differently now.

3) Distribute the saved writings to their owners and invite them to share them with the class.

4) Have students re-write their initial statements in light of what they have learned.

5) Select 1 or 2 finished statements to telecommunicate to the other schools.

6) Retrieve the statements sent by other schools and share them with your students.

7) Celebrate in some way, all the birthdays.

Extensions and Adaptions:

1) Relate all data to current data in the Newspaper if this unit occurs during baseball season.

2) Use your baseball cards throughout the school year for basic computational activities.

3) Use the birthday information or geographic information to spur writing activities - use a word processor.

4) Make a data base using the data on your cards. Make a data base on birthdays and birth places - players and students or one for each.

5) Make a spread sheet to compute BA and ERA.

6) Use existing newspaper stats to generate statistics activities.

7) Keep in touch with your Mentors.

Credits: Developed for Pan Ed by Donna Bullock, 9/1991.
Lesson development based on general instructions in
"Exploring Data" by James M. Landwehr and [illegible].

Olin Environmental Project

This section includes hard copy of materials in the current water treatment interactive learning package:

1. "StarDate 2210 '...And Not a Drop to Drink'"

This is an interactive narrative built on the Star Trek theme familiar to most children of this age. It is the teaching framework which presents subject content to the student and positions the various classroom experiences to act as illustrations.

Because of the benefits of electronic presentation, the student may read the teaching story from the screen or print it as hard copy; may respond to text questions and then check answers filed at the "Ask Captain Olin" feature; may generate their own questions and expect an answer from Olin personnel within twenty four hours; or may take on the final project with an assigned Olin staff member providing distant mentoring through the telecommunication system.

Note: If the project continues, lessons in each of the other three areas will be developed around subsequent installments of the "StarDate 2220" Interactive Narrative.

2. *Narrative Integrated Lessons*

   Lesson 1: "The Case of The Wasteful Water Fountain"

   Lesson 2: "Dirty Water Comes Clean"

   Lesson 3: "Contamination: It CAN Be One In A Million" and,

   Lesson 4: "Safe Water: What You See is NOT What You Get."

3. *Teacher Plan for Water Analysis Spring Project*

Interactive Narrative: StarDate 2220

"... And Not A Drop To Drink"

Water

These are the voyages of the Starship Destiny. Our mission is to seek out truth, protect planet earth and boldly go where few have gone before, but ALL must now follow . . .

Ship's Crew

Captain - Ben J. Olin

First Officer - Lisa Waters

Science Officer - Tom Silver

Environmental Officer - John Green

Navigator - Nancy Knight

Engineer - Lee Sun

Ship's Doctor - Aleeta Crystal

Captain's Log:

Our STARSHIP DESTINY has been damaged in a meteor shower. We are on impulse power, and most of our survival equipment has been destroyed. Sensors have found a deserted planet that can be reached on impulse power.

I, Captain Olin, plan to take a landing party to the Planet Natura.

Question: What 5 things should the landing crew look for to help them decide whether life can exist on this planet? (Compare your answers to this and all StarDate questions to answers in ShareNet at *Curriculum, Science 4-6, Reference*, "Ask Captain Olin")

After visiting Natura and examining records there, we have determined that the planet was once occupied by a civilization

called Ecoes. The Ecoes, living in harmony with nature, had been on the planet for millions of years. They were invaded by aliens call Pollutos, who used up all the resources on the planet and polluted it so severely that both the original inhabitants and the invaders perished.

Natura's pollution happened hundreds of years ago and the planet has been healing itself since then. We find that the atmosphere on the planet has recovered and there is plenty of oxygen for human life forms to survive. The water, however, is a different matter. There are a few lakes with clean water, but this source is limited. The majority of the water on the planet continues to be polluted.

Our first guess is that the natural rainfall on Natura, as on earth, is replenishing a portion of the water supply.

Question: What things might the Pollutos have done to destroy the water on Natura? (Answers at "Ask Captain Olin")

As we explore Natura, First Officer Lisa Waters questions whether we can survive here, but our crippled ship can not take us any further.

We have found an old book that the Ecoes used to manage their world. Its knowledge agrees with ours, stating that one of the basic elements for life is water and that without water, life is impossible. In fact, as on earth, life began in water. The bodes of living things, the extinct Ecoes as well as humans, are made up mostly of water. Also, as on our home planet, the water on Natura is as old as the planet itself. Every molecule of water is recycled over and over. Natura has the same percentage of usable water as earth.

Question: What percent of the water on earth is usable? (To compare your research answer, see "Ask Captain Olin")

John Green, Environmental Officer, has just come to me with a grave concern. The crew members are, of course, drinking and

bathing in the available water. He estimates that this precious water supply will be exhausted within months if we cannot find a way to treat both the wastewater generated from our crew's use and the existing bodies of polluted water on the planet. But even before we address this task, we must determine whether any of the usage water is actually begin wasted by the crew. Lee Sun, Ship's Chief Engineer, has examined the drinking fountain delivery system which the crew has rigged to siphon usable water from the mountain stream, and he has serious doubts about its efficiency.

Chief Engineer Sun asks you help him determine whether the drinking fountain is wasting our precious water:

Activity #1:

> *Through direct observation, measure the amount of water actually drunk by humans using the fountain delivery system and how much water actually flows down the drain during the drinking time and compare them to judge the Amount wasted. (See Olin Environmental Project Lesson 1, "The Case of the Wasteful Water Fountain", on ShareNet at Curriculum, Science 4-6)*

I have asked Science Officer Tom Silver to explain to you and the other Senior Officers how water is naturally recycled so that we may understand what is needed to successfully treat polluted water.

Commander Silver: "Like our home planet, Natura is NOT running out of water. The actual amount of water on both planets remains constant, but it is entirely possible to run out of USABLE water.

First I will explain the water cycle, also known as the hydrologic (hy dro loj' ik) cycle. The hydrologic cycle is tremendously powerful, using more energy in only one day than humankind has generated throughout all of history on planet earth.

At one time, only about .005 percent of the total water supply on earth is moving through the hydrologic cycle. A drop of water spends about nine days passing through the air; once it falls as precipitation (rainfall), it may remain in a glacier for 40 years. A water molecule may remain in the ocean for 40,000 years before being cycled, but eventually, every drop of water on Earth is moved through the hydrologic cycle and is used over and over and over again.

"The water cycle on Natura, as well as Earth, starts from water vapor gathering in clouds. Wind cools the vapor, turning it into a liquid (rain) or a solid (snow, hail and sleet). Gravity makes the rain fall to the planet's surface. Some water runs across the land into bodies of surface water - lakes, streams, oceans, etc. Other water soaks into the ground, pulled by gravity through layers of different materials in a process called "percolation" (per co la' shun). Percolated water is stored in the ground in "aquifers" (ah'kwa furz), which are layers of rock, gravel and sand. This water slowly moves through the aquifer toward the sea. Eventually, ground water becomes surface water, too. For example, it may bubble up through the ocean floor, or appear on the land as a spring. The sun heats surface water, turning it into vapor that rises into the sky. And the cycle begins again! The sun is the "pump" that keeps water going around and around.

The polluted water generated by your crew, as well as Natura's existing polluted bodies of water, will eventually be cleaned by nature. But our crew cannot wait the potentially hundreds of years that would take.

The Ecoe's book explains the ancient art of wastewater treatment. Wastewater treatment speeds up the natural treatment process. We must learn this lost skill if our crew is going to survive.

Before wastewater can be treated, it must be collected. The most efficient method is collection by gravity. Since Natura has

approximately the same gravity as earth, this collection method can be used. In cases where the land is too flat for gravity to move the water, or when the water must go above the land level, a pump can be used to transport the wastewater to the treatment area.

Once the wastewater has been collected, the treatment begins. Wastewater treatment consists of physical, biological and chemical processes. The wastewater is either removed by filtration (primarily treatment), which I will explain, or consumed by bacteria as its food source (secondary treatment), which will be described by Doctor Crystal.

The first step in primary treatment will be removing large solids from the wastewater. This can be done by placing a metallic screen at the beginning of the wastewater treatment process to catch the large solids as wastewater passes through. These solids will have to be removed periodically to keep the filter from plugging.

Because of damage to the ship's computer by the meteor shower, we cannot run a diagnostic of this process the Ecoes described to determine its efficiency. Therefore, the captain has approved my request to assemble a team to physically test whether the basics of the Ecoe's procedure for restoring dirty water actually works. You are included on that team..."

Activity #2

> *Demonstrate basic water treatment using dirty (muddy) water passing it through a funnel and producing clean water. (See Olin Environmental Project Lesson 2, "Dirty Water Comes Clean", on ShareNet Curriculum, Science 4-6)*

"The second step in the treatment process is a grit chamber where heavy materials that might damage equipment or interfere with later processing are removed from the wastewater. The speed of the flow of the wastewater is decreased as wastewater moves

through a sedimentation tank. Solids sink to the bottom of this tank in a process called 'precipitation' (pre-cip-i-ta'-shun) in which heavier particles fall out of a liquid to the bottom. They are then removed. This mass of solids is now called sludge (slu'j). Again, gravity is used to separate the grit from the wastewater.

The third step is the settling tanks. In these tanks additional heavy solids will settle to the bottom, and are also removed as sludge.

The Ecoes refer to the first three treatment process as 'primary treatment'. In the first three treatment methods only gravity, a physical force, is used to separate various sized waste particles.

As Medical Officer, Dr. Aleeta Crystal will explain the largely biological process of secondary treatment."

Dr. Crystal: "The next major treatment the Ecoes have recorded is 'secondary treatment', in which biological and/or chemical process are used to treat the wastewater.

Biological treatment processes use bacteria to remove solids from the wastewater. The bacterium actually eats the organic solids, settles to the bottom of a tank, and the solids (which consist of the well fed bacteria and their food) are collected as sludge. The water remaining is clear and can be returned to a stream. On Natura as well as on Earth, bacteria are abundant. Bacteria are usually associated in our minds with diseases, however the Ecoes have found that on Natura, like Earth, only two percent of all the bacteria is harmful and all the rest perform useful or crucial functions, such as these "house cleaning" actions of eating things that would otherwise harm us.

In order to use bacteria as a wastewater treatment method, we must provide the right mixture of oxygen and food. The Ecoes knew that bacteria are more efficient when oxygen is mixed at the ideal concentration so they can live, multiply and eat.

The bacteria are key to the three major biological treatment process ; activated sludge, trickling filters and lagoons.

Activated sludge is a treatment method where wastewater, microorganisms (bacteria), and oxygen are added together in a tank. Air is pumped into the wastewater in a process called "aeration" (air a' shun). During aeration microorganisms absorb oxygen and eat the organic material. After a few hours, the wastewater is piped to another sedimentation tank to remove the remaining solids. The solids (which are the bacteria and all they've eaten) settle to the bottom of the tank and are removed as sludge.

Trickling filters distribute the wastewater over a bed of small solid objects called 'media' which may be rocks, plastic, wood or aluminum cans. The solid media is approximately 0.4 to 1.8 meters deep. As the wastewater flows over the solid media, the wastewater is aerated and the microorganisms form a biological growth layer in which they live while they consume most of the organic material in the wastewater. The growth layer (which consists of well-fed microorganisms and which is thick and easy to see) eventually falls off the solid media and is collected, again, as sludge. A new growth layer will grow to replace it.

In Lagoon wastewater treatment, pollutants are broken up through the use of various microorganisms. The lagoons are usually 1 to 1.5 meters deep. This process uses sunlight, algae, microorganisms and oxygen to remove organic material and nutrients from the wastewater. There are two types of microorganisms used in lagoon treatment: aerobic (ai 'ro bik) (microorganisms that use oxygen in the process of consuming the pollutants), and anaerobic (an ai 'ro bik) bacteria which eat different pollutants and release nitrogen and phosphorus which feed algae, in turn replacing oxygen used up by the aerobic bacteria. Because these have opposite effects on oxygen, they create a balanced action.

The final treatment process is disinfection. This process kills disease-causing organisms by addition of a disinfectant chemi-

cal such as chlorine. Ultraviolet light rays can also disinfect wastewater.

The wastewater could now safely be discharged to local surface waters, and the Destiny crew's water problems would be over."

Captain's Log:

Doctor Crystal has come to me with a report of numerous bacteria-caused illnesses developing among crew members stationed in the field on this planet, but not among those who remain aboard the Destiny. It is her opinion that because the ship has no extra power to run their diagnostic tricorders when they are out on the planet's surface, crewmembers are guessing at what water is safe to drink, basing their decision only on appearance.

I directed our Medical Officer to call together all crew members and instruct them that very small amounts of some pollutants are still hazardous to their health, that judgements of water quality made through their senses are unreliable, and that they must bring all samples on board to the medical lab for analysis.

I am including her instructions here.

Activity #3

> *Demonstrate simple water purity test consisting of 5 glasses of water filled with common household liquids such as weak tea, coffee, mixture of food coloring in water, water and suspended mud and add one or two drops of gasoline to water. Ask students which water samples appear to be pure. (See Olin Environmental Project Lesson 3, "Dirty Water Comes Clean", on ShareNet at Curriculum, Science 4-6.)*

Activity #4

> *Demonstrate serial dilution using three glass beakers with different concentration of diluted food coloring. Making*

> *serial dilutions can help students grasp the concept of minute concentrations of pollutants. By beginning with a known volume of a pollutant (one milliliter), and using a factor of ten for each dilution step, a concentration of parts per million can be completed in three steps. The student can determine if color is still visible at one part per million. (See Olin Environmental Project Lesson 4, "Safe Water: What You See Is NOT What You Get!", on ShareNet at Curriculum, Science 4-6).*

A final entry from First Officer Lisa Waters:

"The Ecoes warn that the sludge generated from the treatment process is hazardous and must itself be treated in order to complete the treatment cycle.

The first step in sludge treatment is to remove the water from the solids. This is done by gravity. Chemicals are also added to kill disease-causing organisms. The sludge will eventually be 'stabilized' (no more dangerous pollutants will exist in it) and turn into harmless organic matter. This material can be placed into a landfill, deposited into the ground or composited to be used as a fertilizer or soil conditioner.

The Ecoes also mentioned that there were smaller forms of wastewater treatment for Ecoes or humanlife living in rural areas. These treatment processes are called septic Tanks, Leach Fields and Sand Filters.

Septic Tanks separate the solids from the liquid. The solids collect on the bottom the [sic] tank and are parochially pumped out to a community treatment facility or an approved disposal site. The practically treated wastewater is piped to a leach field. The wastewater pumped to the leach field and is allowed to seep through the soil. The soil acts like a filter and removes bacteria and nutrients in the wastewater. The microorganisims in the soil purify the wastewater.

Sand filters are used in soon [sic] areas were [sic] water tables are high on the soils and do not allow the water to pass through them easily. Sand and gravel are mounded on top of natural soil to filter wastewater received from septic tanks before the wastewater reaches the natural soil.

This information will be crucial to us if we are not rescued soon and the Destiny's personnel and their families actually have to establish a colony here."

Captain's Log

Our most serious problem, the need to preserve and enlarge Natura's usable water, is well on its way to being solved.

I commend you and your crew members for your courage and excellent work.

Special Assignment from the Captain:

In order to survive on this planet, our crew must construct a wastewater treatment plant from the equipment in your damaged ship. You now have the basic information from the Ecoes treatment book: Your project is to draw a sketch of a wastewater treatment facility. Start with the collection system and take it all the way to sludge treatment.

For further information, go to ShareNet at Curriculum, Science 4-6, Reference, "Ask Captain Olin".

If you wish to do this project, you may ask at "Captain Olin" for your own Olin Mentor.

Olin Environmental Project

Water

Lesson 1:

The Case of the Wasteful Water Fountain

StarDate 2220: Chief Engineer Sun, of the disabled Starship Destiny, asks our help in determining whether the crew is wasting precious water by using a fountain.

GRADE LEVEL: 5

OBJECTIVES:

Students will predict and measure the average amount of clean water used to drink at a drinking fountain, and compare amount actually consumed with amount wasted.

INTRODUCTION:

After studying the water cycle (lecturette in the StarDate 2220 Narrative "Not A Drop To Drink"), students will be aware that there is a limited freshwater supply. This activity is designed to develop student awareness of: how much water is used during an activity as routine as getting a drink from the drinking fountain; relative efficiencies of one water delivery system over another (e.g.: fountain vs. cup use); and the benefit and drawbacks of each system (waste of water in fountain delivery vs. environmental problems of paper cups and infection control issues of reusable cups).

MATERIALS:

- Stopwatch
- 500 ml beakers
- two large containers (small buckets)
- calculators
- drinking glasses with ounces marked

PROBLEMS/CAUTIONS:

More accurate results will be obtained if students who are to be observed in this project do not know what researchers are watching for. Have "fountain watchers" try to position themselves out of the way and watch from a distance. If other students ask what the researchers are doing, have them reply, "we are studying water use." If students press for more information, researchers may say, "we are just counting. But while we are researching, we're not supposed to talk." Explain that experimental subjects, such as their fellow students, tend to behave differently (in this case, drink longer or shorter times) if they know which of their actions are being observed. The potential of the behavior of the researchers to influence the actions of research subjects is an important piece of information about scientific technique.

PROCEDURE:

1. Explain to the students the procedure for collecting water samples.

   a) Using two separate containers, the students will collect water from their designated drinking fountains by pressing the button all the way down, allowing maximum water flow. One sample will be for 5 seconds and another for 30 seconds.

   b) Assign teams of two students to designated water fountains, one student to depress the button and manage the capture container and the other to keep time.

2. After the water collection is made, the students return to the room and determine, in milliliters, the amount of water that was collected. After recording their findings the students then find the average amount of

water that is released from the drinking fountain. (Other teams could be sent out to double check the first teams findings, or those students not collecting the water could re-check the volume of the amount collected.)

3. Ask students to predict the amount of water used per student, per drinking fountain visit.

4. Send the teams out into the school and have them "stakeout" the drinking fountain. One student will record the length of drink with the stopwatch, while the other records the number of students getting a drink at that particular fountain. (For example, Student #1...7 sec., #2...4 sec.) This should be scheduled at a time when students are not coming in from recess, so as to not inflate the results. Scheduling could be arranged at different times of the day. (For example, team #1 9:00-9:30, team #2 9:30-10:00, team #3 1:30-2:: etc.)

5. With your results, find the average length of drink (this could be done per individual fountain), and then multiply that number times the number of students drinking during the time measured (1/2 hour). Multiply this times the number of 1/2 hour segments of a school day to calculate the average amount of water used in at a drinking fountain.

6. Waste measurement: Student researchers measure the amount actually drunk by ten different students drinking from glasses instead of the fountain. (Note: These students are offered their water in a glass, on which ounces have been marked, when they arrive at the fountain. They are told to drink only what they want. The duration of their drinking is measured in seconds and amount drunk per student is then calculated and

averaged among all glass drinkers.) These amounts are then averaged into a standard amount consumed. Researchers then collect the water expended by each fountain in the school, running fully open, during ten second intervals. This amount is averaged into a standard volume per second. The difference between the two is freshwater wasted.

EVALUATION:

Ask the students: What is the average amount of water used? How does their prediction compare? What are some possible explanations for the difference between their prediction and the actual results? Is freshwater for drinking efficiently conserved by the fountain delivery system? Why or why not?

Explore the alternatives. Students should consider the cost and distribution/waste management aspects of disposable cups. They should research the infection control issues brought up by the use of re-usable cups, their expense, energy use to heat water for washing and time involved. Compare and contrast. Which choice is most environmentally sound? What are their benefits and drawbacks?

EXTENSIONS:

Using the volume average of fountain output already established in the main research protocol, students measure the number of drinkers at all fountains in a standard hour and calculate the total consumption for the whole school in one day? What would be total volume? For the town? What are other necessary activities that require clean freshwater? Are there any that could use recycled water?

SOURCE:

Olin Curriculum Design Teacher Team
The Olin Project on Environmental Science
Sponsored by: Olin Defense Systems
Lake City Army Ammunition Plant
Independence, MO

Olin Environmental Project

Water

Dirty Water Comes Clean

PROCEDURE:

1. Cut the plastic bottle in half. Using a rubber band place the nylon screen material over the mouth of the bottle and secure around the bottle's neck with a rubber band.

2. Push the cotton ball into the neck of the bottle from the inside and invert the bottle so the mouth is pointing down. Place it into the other half of the bottle so the bottom half acts as a catcher for the liquid as it runs through the filter. With the ground up charcoal and sand, alternate layers of approximately 1 - 1.5 cm in thickness over the cotton ball starting with the sand, then the charcoal, then more sand, etc.

3. In a 500 mi beaker, add the 100 mi of soil to 400 mi of water and stir. Add a few drops of food coloring and the vinegar. Mix thoroughly and find the mass of the mixture on the balance and record.

4. After finding the mass, make sure the contents are mixed well and pour into the charcoal and sand filter. When all of the muddy mix has been emptied out, place some plastic wrap over the top of the filter and secure with a rubber band.

5. Let contents filter overnight.

6. Remove plastic wrap and the top half of the filter to remove the filtered water. Pour into 500 mi beaker and find the mass of the filtered mixture. Record mass and observations.

EVALUATION:

The following questions will help students make their observations:

1. What physical changes have taken place in the filtration? Consider clarity and color of the water.

2. Has the smell of the water changed? What in the filter could have been responsible for this change?

3. If filtered again, what will happen to the water?

EXTENSIONS:

1. Try making a filter with other materials (called in water purification a different "medium") such as small pebbles, crushed limestone, or different types of soils. Try testing other water traits like pH and other liquids mixed in for smell or clarity. What conclusions can be drawn about how to reduce water pollution?

2. Water that is not potable (safely drinkable) is often also dangerous to many plant and animal species for whom it is home. What are some life forms that may be destroyed by contaminated water?

SOURCE:

Olin Curriculum Design Teacher Team
The Olin Project on Environmental Science
Sponsored by: Olin Defense Systems
Lake City Army Ammunition Plant
Independence, MO

Olin Environmental Project

Water

Lession 3

Contamination: It Can Be One In A Million

StarDate 2220: First Officer Waters reporting:

The Starship Destiny Away Team has been working with Medical Officer Aleeta Crystal to reduce crew member sickness from drinking contaminated water. To be certain the crew is fully aware of the need to avoid drinking water that has not been analyzed in the Destiny's on-board laboratories, I am asking each of you to perform the following experiment.

GRADE LEVEL: 5

OBJECTIVES:

The student will define parts per million and parts per billion.

INTRODUCTION:

Parts per million or parts per billion is a measurement of the dilution of a chemical that is in minute concentrations. This analytical process can be used to test such things as ground water for contamination. As pollutants are absorbed into the soil, they are greatly diluted with rainwater. Even toxins in great dilution, in which only very small amounts of the toxin remain in a great amount of clean water, can still be dangerous to living things. Its detection and measurement can be determined and quantified in the small parts we call parts per million and parts per billion.

MATERIALS:

- Red or Blue food coloring
- Water
- 5 clear containers (glass beakers or jars)
- Dropper

PREPARATION:

Tell the students that even though they cannot see any evidence of pollution in water, this does not mean that it is not present. Pollutants in our ground water are measured in parts per million and parts per billion. Even very small amounts can be hazardous. Some examples of what these numbers mean are:

"One Part Per Million" (1 ppm) - Is equal to: one step on a walk (north to south) across Minnesota; one second in 11.7 days; a pitcher of tea in an olympic size swimming pool; a bucket of sand (1.5 Liters) in a football field 1 foot deep.

"One Part Per Billion" (1 ppb) - Is equal to: one step on a journey nineteen times around the earth (at the equator); one second in 32 years; a marble in a football field 1 foot deep; one drop in a full railroad tank car or one drop in a full olympic size swimming pool.

Remember:

There are one thousand times one thousand in one million 1,000 x 1,000 = 1,000,000

There are one thousand times one million in one billion 1,000 x 1,000,000 = 1,000,000,000

PROCEDURE:

1. With the dropper, put 9 drops of water into a clear container and label it "A". Add one drop of food coloring to it and stir. This represents a dilution of 1/10. Rinse the dropper after each use with water so as to not contaminate the experiment by exceeding the correct amount of dilution.

2. With the dropper, put 9 drops of water in another container. Add one drop of the mixture from "A" to it and mix. Label this one "B". The food coloring in container "B" is now diluted to 1/100.

3. Continue this procedure with the other containers, labeling them appropriately and placing 9 drops of water in each, followed by one drop from the previous container.

4. Container "C" will represent 1/1,000 dilution. "D" is 1/100,000. "E" is finally the representation 1/1,000,000 or one part per million.

5. Question students: At what point can you no loner see any trace of the color? If the color had been a deadly toxin, at what point would you no longer be able to protect yourself by visually judging the water purity?

6. To be certain that students don't leave this lesson afraid to drink from the kitchen faucet, assure them that their water is tested every day with very sophisticated equipment and chemical detectors that routinely analyze at the level of ppm and ppb.

EVALUATION:

What does *part per million* mean? (One drop of pollutant to one million drops of water.)

What does *part per billion* mean? (One drop of pollutant to one billion drops of water - the full olympic pool.)

EXTENSIONS:

This same demonstration can be done with gasoline instead of food coloring to show that even our smell cannot detect the presence of a chemical. The human threshold for gasoline is about five parts per billion. What kinds of water tests are done to determine the quality of your home water supply? Determine other examples of parts per million.

SOURCE:

Olin Curriculum Design Teacher Team
The Olin Project on Environmental Science
Sponsored by: Olin Defense Systems
Lake City Army Ammunition Plant
Independence, MO

Olin Environmental Project

Water

Safe Water: What You See is NOT What You Get!

StarDate 2220: Dr. Crystal has asked all Starship Destiny crew members to learn about waste contamination so that Away Team members in the field no longer become ill.

GRADE LEVEL: 5

OBJECTIVES:

Students will determine if they can predict water quality by using their sense.

INTRODUCTION:

As an introduction to judging water quality, a visual test can be made to determine some general characteristics of the water, yet it reveals very little in terms of its quality. In our past, sewage was the primary source of water contamination. At the present time, our technology has developed thousands of chemicals that can also be harmful to our health if they make their way into the water supply. Many of these do end up in our water resources and cannot be detected with a visual check or identified through sense of smell.

From this experiment students will learn that appearance is a poor test for determining water quality. For example,

rusty water poses no health hazard, yet appears to be unfit to drink.

This activity should have an impact on children, who will grasp the limits of their senses in detecting water contamination and who will understand how small a contaminate can spoil water quality.

MATERIALS:

- Tea
- Coffee
- Food coloring
- Dirt
- Clear containers that can be sealed for the samples below
- Small amount of gasoline
- Small amount of creek or pond water
- Dishwashing soap (other samples of water can be prepared along these lines)

PREPARATION:

In advance, prepare small samples of the mixtures above to represent different types of water. They should be placed in clear containers and sealed so no odors will influence student predictions. DO NOT ALLOW ANY STUDENTS TO DRINK THE SAMPLES OF WATER!

PROCEDURE:

1. Have the prepared and numbered water samples displayed in front of you so the class can visually see each container. Introduce each one as a mystery sample of water collected around town.

2. Ask students which samples they think represent clean or pure water. Why or why not? Discuss the physical characteristics.

3. Remove the tops of the containers for a closer inspection, allowing for smell to influence and possibly change their predictions.

4. Once again ask the students to discuss which samples may be clean or drinkable ("potable") water. Why or why not?

5. Discuss appearance as a poor test of the quality of water.

EVALUATION:

What senses can we use in attempting to determine if water is safe to drink? Is the use of our senses a safe way to determine water purity?

EXTENSIONS:

Have students research the effects on humans of drinking the various samples or the effects they might have on the environment. Visit a public water supply plant to observe water testing. Ask a high school chemistry teacher or chemist to visit your classroom to discuss water quality with your students. Ask the Infection Control Nurse from you area hospital to visit and discuss water from a disease prevention point of view. Research effect on campers and hikers who drink "clear" mountain stream water and become sick from the bacteria, or travelers to other countries who become ill from the water there.

SOURCE:

Olin Curriculum Design Teacher Team
The Olin Project on Environmental Science
Sponsored by: Olin Defense Systems,
Lake City Army Ammunition Plant
Independence, MO

Adapted by: Missouri Department of Natural Resources
Groundwater Protection Curriculum Guide pp 39-41.

The University of Kansas ShareNet Partnership Project
(results) July, 1992

Olin Environmental Project

The Olin Project for Environmental Science
Spring Water Quality Project, 1993

Update from the Olin Environmental Project's Teacher Participants

Written by Wallie Winholtz, Lead Teacher

Spring Project

Our initial project includes the following water quality tests: Dissolved Oxygen, pH and temperature measurement, and study of the benthic macroinvertebrates. So as to not reinvent the wheel, many of the procedures we followed for data collection came from the *Field Guide for Water Quality Monitoring. An Environmental Education Programs for Schools* by Mark K. Mitchell and William B. Stapp. Their procedures have been tried and proven to be reliable and have been the basis for many water projects across the country.

Before going out to conduct our tests, the teachers involved became familiar with the testing on a weekend outing to a local stream. To prepare the students for the data collection proce-

dures, each separate test was discussed and practiced in the classroom using tapwater collected from students' homes. This made our use of time in the field more efficient.

Data Collection Procedures - Dissolved Oxygen

The following is a description of some general information about collecting a sample of water for testing dissolved oxygen.

Because dissolved oxygen (DO) levels vary so much according to time, weather, and temperature, this test should be run during the same period (week and time of day), if yearly comparisons are to made [sic].

It is best to sample away from shore and below the water surface. In a free-flowing river or stream with good mixing, samples taken beneath the surface in the current should be a representative sample. In slow moving water, it is best to sample away from shore and at various depths. Remember to test for DO immediately after securing the sample. For specific testing procedures, follow the instructions that come with your particular test kit.

The lowest DO amount (mg/L) at which fish survive for 24 hrs. (summer) are Black Bass 6.0, Yellow Perch 4.2, and Black Bullhead 3.3 Examples of macroinvertebrates that cannot tolerate low levels of DO are mayfly nymphs, caddisfly larvae, and beetle larvae. Examples of pollution-tolerant organisms are worms and fly larvae. You might also find nuisance algae and anaerobic organisms surviving at low DO levels.

pH

The following are some important things to remember about testing for pH.

A water sample that is less than 7 is said to be "acidic" and a reading over 7 is "basic". It is important to realize that for every one unit change on the pH scale, there is approximately a ten-fold change in how acidic or basic the sample is. For example, a

reading of 4.3 is approximately ten times more acidic than a reading of 5.0-5.6 and a pH of 4 is about 100 times more acidic than a pH of 6. If the stream contains a lot of limestone, it may neutralize the effects of acids.

An extremely high or low pH makes the water unsuitable for most organisms. In lakes, a pH below 5 is a serious problem. Very acidic waters can cause heavymetals, such as copper and aluminum, to be released into the water. Heavy metals can accumulate on the gills of fish or cause deformities in young fish.

Like DO, the sample collected should be done away from shore and below the surface. The sample should be measured immediately, because the temperature can affect the pH value. If many samples are tested, the most frequently reported pH value should be used rather than the average value. Please follow the testing instructions found with your test kit.

Limiting pH Values:

Min.	Max.	Effects
3.8	10.0	Fish eggs could be hatched, but deformed young possible.
4.0	10.1	Limits for the most resistant fish.
4.1	9.5	Range tolerated by trout.
4.3		Carp died in 5 days.
4.6	9.5	Limits for Perch.
5.0	9.0	Tolerable range for most fish.
8.7		Upper limit for good fishing waters.
6.0	7.2	Optimum range for fish eggs.
1.0		Mosquito larvae were destroyed at this pH value.
7.5	8.4	Best range for the growth of algae.
2.0	13.0	Bacteria
7.0	8.5	Largest variety of Macro Invertebrates.

Temperature

The temperature of a river or stream is very important for water quality. It can directly influence:

1. the amount of oxygen dissolved in the water
2. the rate of photosynthesis by algae and other aquatic plants
3. the metabolic rates of aquatic organisms
4. the sensitivity of organisms to toxic wastes, parasites, and diseases.

Remember, cool water can hold more oxygen than warm water, because gases are more easily dissolved in cool water. Change in temperature can be caused by industries introducing warmer water to the stream, storm water runoff of warm urban surfaces, lack of shade on the stream due to cutting down trees, and suspended solids caused by soil erosion.

As the temperature rises, the rate of photosynthesis and plant growth also increases. More plants grow and more plants die. Decomposition by bacteria consumes more oxygen. The metabolic rate of the organisms rises with an increased temperature, thus a higher demand for oxygen. Life cycles of aquatic organisms speed up and can cause problems for birds that feed on certain organisms emerging at specific periods during their migratory flights.

When testing water for temperature, lower the thermometer four inches into the water for approximately 2 minutes to obtain a constant reading. Record your measurement. If looking for "thermal" pollution, also take a reading approximately one mile up stream. Find the difference in the temperatures to find the temperature change. Record.

Benthic Macroinvertebrates

The variety of aquatic organisms can also contribute to the whole picture of the stream's health. Some organisms are more plentiful in certain environments and sometimes a wide variety of organisms can indicate the waters ability to support life. This can be judged from the information gathered in a survey of organism diversity. Ideally, a survey of macroinvertebrates should be dispersed along the length of a river, so that changes in water quality and shifts in the aquatic community from headwaters to mouth can be noted. Sampling should be done in March/April or late October if only done once or twice a year.

Collecting should be done in a riffle area, i.e. a somewhat shallow area with steady current and rock and gravel bottom. Safety precautions should be taken to protect your skin. Rubber gloves and rubber boots are ideal. Washing hands after sampling is recommended.

There are a variety of ways to collect these tiny organisms. In general, you are looking for a variety of macroinvertebrates to help in determining the stream's health. These can be collected by turning over rocks and examining the undersides for the organisms or using a variety of nets to catch them as you stir up the substrate. Make sure the net is downstream from the area being disturbed and the organisms will flow into the net and be lifted from the water where the collection can take place.

Examples of pollution-sensitive organisms are mayflies, stoneflies, some caddisflies, riffle beetles, and hellgramites.

Examples of pollution-tolerant organisms are aquatic worms, leeches, and certain midge larva.

Methods can be found for collecting these organisms and using other water quality testing measures in Mitchell and Stapp's *Field Guide for Water Quality Monitoring.*

1990 Census Basic Tables for Missouri Counties

37. Gasconade County.
38. Gentry County.
39. Greene County.
40. Grundy County.
41. Harrison County.
42. Henry County.
43. Hickory County.
44. Holt County.
45. Howard County.
46. Howell County.
47. Iron County.
→ 48. Jackson County.
49. Jasper County.
50. Jefferson County.
51. Johnson County.
52. Knox County.
53. Laclede County.
54. Lafayette County.

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1 MISSOURI STATE CENSUS DATA CENTER
1990 SUMMARY TAPE FILE 3 EXTRACT REPORT

STATE	→	MO
GEOCODE	→	29095
AREANAME	→	Jackson County

XP1. GENERAL POPULATION

TOTAL PERSONS/PERCENT SAMPLED	633,232	13.3%
PER SQUARE MILE/LAND AREA	1047.16	604.71
FEMALES	332,302	52.5%
LIVING IN RURAL AREAS/ ON FARMS	22,003	1,277
LIVING IN FAMILIES/ALONE	520,252	73,787
LIVING IN GROUP QUARTERS	11,302	1.8%

XP2. PERSONS BY RACE/HISPANIC

WHITE	478,889	75.6%
BLACK	135,696	21.4%
ASIAN & PACIFIC ISLANDER	5,917	0.9%
AMERICAN INDIAN, ESK., ALEUT	3,417	0.5%
HISPANIC (ANY RACE)	18,689	3.0%

XP3. PERSONS BY AGE

0-4 / PCT / CUM PCT	48,054	7.6	7.6
5-9	46,977	7.4	15.0
10-13	33,795	5.3	20.3
14-17	32,007	5.1	25.4
18-24	60,534	9.6	35.0
25-34	117,234	18.5	53.5
35-44	92,551	14.6	68.1
45-54	64,023	10.1	78.2
55-59	27,744	4.4	82.6
60-64	27,682	4.4	86.9
65-74	46,438	7.3	94.3
75-84	26,431	4.2	98.5
85 AND OVER	9,762	1.5	100.0
UNDER 20	177,836	28.1	
20-39	210,396	33.2	
40-64	162,369	25.6	
65 AND OVER	82,631	13.0	
MEDIAN AGE	33.2		

XP4. HOUSEHOLDS BY SITE

TOTAL HOUSEHOLDS/ AVERAGE SITE	252,202		2.47
1 PERSON/1 PERSON OVER 65	73,787		27,684
PCT HHS: 2 PERSONS / 3-4 / 5+	31.5%	30.0%	9.3%

XP5. HOUSEHOLDS BY TYPE

FAMILIES/PCT OF ALL HOUSEHOLDS	165,847	65.8%
MARRIED COUPLES/PCT OF FAMILIES	124,172	74.9%
WITH OWN CHILDREN < 18	55,581	33.5%
FEMALE HOUSEHOLDER (NO HUSB)	34,265	20.7%
WITH OWN CHILDREN	20,458	12.3%
NON-FAMILY HOUSEHOLDS	86,355	34.2%

XP6. HOUSEHOLD INCOME 1989

LESS THAN $10,000/PCT/CUM PCT	41,598	16.5	16.5
$10,000 - $14,999	23,495	9.3	25.8
$15,000 - $24,999	47,243	18.7	44.5
$25,000 - $34,999	42,874	17.0	61.5
$35,000 - $49,999	46,204	18.3	79.9
$50,000 - $74,999	34,994	13.9	93.7
$75,000 - $99,000	9,127	3.6	97.4
$100,000 AND OVER	6,667	2.6	
MEDIAN/AVERAGE	$27,853		$34,129

XP7. FAMILIES BY # WORKERS
COUNT/AVG FAMILY INCOME 1989

0 WORKERS	20,756	$20,113
1 WORKER	46,576	$30,280
2 WORKERS	77,712	$46,575
3+ WORKERS	20,803	$57,703

XP8. OTHER INCOME MEASURES

MEDIAN/AVG FAMILY INCOME	$34,300	$40,083
PER CAPITA INCOME/NON-GRP QTRS	$13,712	$13,865
PERSONS BELOW POVERTY LEVEL	81,142	13.0%
PERSONS BELOW 50% OF POVERTY	40,897	6.6%

XP9. LEVEL OF EDUCATION

TOTAL PERSONS AGE 25+	41	
1,865 100% IN%"net-resources@is.internic.net"		
LESS THAN 9TH GRADE	27,120	6.6%
9TH TO 12TH GRADE, NO DIPLOMA	57,344	13.9%
HIGH SCHOOL GRAD. (OR EQUIV)	134,837	32.7%
SOME COLLEGE, NO DEGREE	88,698	21.5%
ASSOCIATE/BACHELOR'S DEGREE	76,632	18.6%
GRADUATE OR PROFESSIONAL DEGREE	27,234	6.6%

XP10. UNEMPLOYMENT: CIV LAB FORCE

TOTAL CLF: UNEMPLOYED/RATE	21,675	6.6%
FEMALE: UNEMPLOYED/RATE	9,240	5.8%

XP11. OCCUPATION

TOTAL EMPLOYED PERSONS AGE 16+	309,069	100%
MANAGER. & PROF. SPECIALTY OCC	78,255	25.3%
TECH, SALES, ADMIN. SUPPORT	110,984	35.9%
SERVICE OCCUPATIONS	43,033	13.9%
FARM, FORESTRY, FISHING	2,430	0.8%
ALL OTHERS	74,367	24.1%

XH1. GENERAL HOUSING UNITS

TOTAL UNITS / OCCUPIED UNITS	280,729		252,582
% UNITS:OWNER OCC/RENTED/VACANT	55.2%	34.8%	10.0%
SINGLE-FAMILY UNITS	190,896		68.0%
IN BUILDINGS WITH 5+ UNITS	58,108		20.7%
CONDOMINIUMS/MOBILE HOMES	6,291		3,362

XH2. YEAR STRUCTURE BUILT

MEDIAN YR BUILT/DECADE MOST BLT	1960	PRE 1940
BUILT IN BUSIEST DECADE	64,580	23.0%
BUILT 1985-MARCH 1990	22,903	8.2%
BUILT 1939 OR EARLIER	64,580	23.0%

XH3. HOUSING VALUES AND RENTS

SPEC. OWNER-OCC UNITS/ AVG VALUE	139,475	66,735
UNITS PAYING CASH REN/ AVG RENT	94,039	$413
MEDIAN HOME VALUE/ MEDIAN RENT	$58,000	$402

Press <RETURN> to continue, <m> to mail:

→ 1. 1990 Census Basic Tables for MO Congressional Districts/
New mail on node BOS1C from IN%"guest@bigcat.missouri.edu"
3. 1990 Census Basic Tables for Missouri House Districts/
4. 1990 Census Basic Tables for Missouri Places/
5. 1990 Census Basic Tables for Missouri Senate Districts/
6. 1990 Census Basic Tables for Missouri Tracts/BMAs/

Press ? for Help, q to Quit, u to go up a menu
Retrieving Directory..-

Internet Gopher Information Client v1.11

1990 Census Basic Tables for MO Congressional Districts

1. MO CONGRESSIONAL DISTRICT 1.
2. MO CONGRESSIONAL DISTRICT 2.
3. MO CONGRESSIONAL DISTRICT 3.
→ 4. MO CONGRESSIONAL DISTRICT 4.
5. MO CONGRESSIONAL DISTRICT 5.
6. MO CONGRESSIONAL DISTRICT 6.
7. MO CONGRESSIONAL DISTRICT 7.
8. MO CONGRESSIONAL DISTRICT 8.
9. MO CONGRESSIONAL DISTRICT 9.
10. $DIRCTRY.

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1 MISSOURI STATE CENSUS DATA CENTER
1990 STF3 EXTRACT REPORT:
MISSOURI CONGRESSIONAL DISTRICTS

STATE	→	MISSOURI
GEOCODE	→	04
AREANAME	→	MO CONG DISTRICT 4

XP1. GENERAL POPULATION

TOTAL PERSONS/PERCENT SAMPLED	569,220	20.2%
PER SQUARE MILE/LAND AREA	40.99	13887.66
FEMALES	286,498	50.3%
LIVING IN RURAL AREAS/ ON FARMS	347,025	43,334
LIVING IN FAMILIES/ALONE	480,263	49,569
LIVING IN GROUP QUARTERS	25,335	4.5%

XP2. PERSONS BY RACE/HISPANIC

WHITE	542,800	95.4%
BLACK	18,318	3.2%
ASIAN & PACIFIC ISLANDER	2,948	0.5%
AMERICAN INDIAN, ESK., ALEUT	3,023	0.5%
HISPANIC (ANY RACE)	5,966	1.0%

XP3. PERSONS BY AGE

0-4 / PCT / CUM PCT	40,609	7.1	7.1
5-9	42,524	7.5	14.6
10-13	34,298	6.0	20.6
14-17	31,411	5.5	26.1
18-24	58,463	10.3	36.4
25-34	90,366	15.9	52.3
35-44	77,808	13.7	66.0
45-54	58,503	10.3	76.2

55-59	26,141	4.6	80.8
60-64	26,166	4.6	85.4
65-74	45,348	8.0	93.4
75-84	27,947	4.9	98.3
85 AND OVER	9,638	1.7	100.0
UNDER 20	167,865	29.5	
20-39	170,764	30.0	
40-64	147,660	25.9	
65 AND OVER	82,932	14.6	
MEDIAN AGE	33.6		

XP4. HOUSEHOLDS BY SITE

TOTAL HOUSEHOLDS/ AVERAGE SITE	212,243		2.56
1 PERSON/1 PERSON OVER 65	49,569		25,556
PCT HHS: 2 PERSONS / 3-4 / 5+	34.7%	32.3%	9.7%

XP5. HOUSEHOLDS BY TYPE

FAMILIES/PCT OF ALL HOUSEHOLDS	156,582	73.8%
MARRIED COUPLES/PCT OF FAMILIES	135,652	86.6%
WITH OWN CHILDREN < 18	62,989	40.2%
FEMALE HOUSEHOLDER (NO HUSB)	16,227	10.4%
WITH OWN CHILDREN	10,260	6.6%
NON-FAMILY HOUSEHOLDS	55,661	26.2%

XP6. HOUSEHOLD INCOME 1989

LESS THAN $10,000/PCT/CUM PCT	39,839	18.8	18.8
$10,000 - $14,999	26,043	12.3	31.0
$15,000 - $24,999	48,324	22.8	53.8
$25,000 - $34,999	36,794	17.3	71.1
$35,000 - $49,999	34,041	16.0	87.2
$50,000 - $74,999	19,496	9.2	96.4
$75,000 - $99,000	4,621	2.2	98.5
$100,000 AND OVER	3,084	1.5	
MEDIAN/AVERAGE	$23,065		$28,599

XP7. FAMILIES BY # WORKERS
COUNT/AVG FAMILY INCOME 1989

0 WORKERS	21,338	$17,757
1 WORKER	42,482	$26,298

→ 4. 1990 Census Basic Table for Missouri Places/
5. 1990 Census Basic Tables for Missouri Senate Districts/
6. 1990 Census Basic Tables for Missouri Tracts/BNAs/

Press ? for Help, q to Quit, u to go up a men Retrieving Directory..-
Internet Gopher Information Client v1.11

1990 Census Basic Tables for Missouri Places

1. A/
2. B/
3. C/
4. D/
5. E/
6. F/
7. G/
8. H/
9. I/
10. J/
→ 11. K/
12. L/
13. M/
14. N/
15. O/
16. P/
17. Q/
18. R/

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Internet Gopher Information Client v1.11

K

1. Kahoka city.
→ 2. Kansas City city.
3. Kearney city.
4. Kelso town.
5. Kennett city.
6. Keytesville city.
7. Kidder city.
8. Kimberling City ci.
9. Kimmswick city.
10. King City city.
11. Kingdom City villa.
12. Kingston city.
13. Kingsville city.
14. Kinloch city.
15. Kirksville city.
16. Kirkwood city.
17. Knob Noster city.
18. Knox City city.

Press ? for Help, q to Quit, u to go up a menu Receiving Information..-

1 MISSOURI STATE CENSUS DATA CENTER
1990 STF3 EXTRACT REPORT: MISSOURI PLACES

COUNTY	→	JACKSON
GEOCODE	→	29-2220
AREANAME	→	Kansas City city

XP1. GENERAL POPULATION

TOTAL PERSONS/PERCENT SAMPLED	435,141	13.3%
PER SQUARE MILE/LAND AREA	1397.01	311.48
FEMALES	228,707	52.6%
LIVING IN RURAL AREAS/ON FARMS	1,630	222
LIVING IN FAMILIES/ALONE	346,853	56,737
LIVING IN GROUP QUARTERS	8,983	2.1%

XP2. PERSONS BY RACE/HISPANIC

WHITE	290,898	66.8%
BLACK	128,843	29.6%
ASIAN & PACIFIC ISLANDER	4,903	1.1%
AMERICAN INDIAN, ESK., ALEUT	2,240	0.5%
HISPANIC (ANY RACE)	16,819	3.9%

XP3. PERSONS BY AGE

0-4 / PCT / CUM PCT	33,436	7.7	7.7
5-9	31,179	7.2	14.8
10-13	21,944	5.0	19.9
14-17	21,090	4.8	24.7
18-24	42,521	9.8	34.5
25-34	85,564	19.7	54.2
35-44	63,103	14.5	68.7
45-54	42,461	9.8	78.4
55-59	18,372	4.2	82.7
60-64	19,166	4.4	87.1
65-74	32,130	7.4	94.4
75-84	17,763	4.1	98.5
85 AND OVER	6,412	1.5	100.0
UNDER 20	119,079	27.4	
20-39	151,116	34.7	
40-64	108,641	25.0	
65 AND OVER	56,305	12.9	
MEDIAN AGE	32.9		

XP4. HOUSEHOLDS BY SITE

TOTAL HOUSEHOLDS/ AVERAGE SITE	177,157	2.41	
1 PERSON/1 PERSON OVER 65	56,737	19,195	
PCT HHS: 2 PERSONS / 3-4 / 5+	31.0%	27.8%	9.2%

XP5. HOUSEHOLDS BY TYPE

FAMILIES/PCT OF ALL HOUSEHOLDS	110,206	62.2%
MARRIED COUPLES/PCT OF FAMILIES	77,942	70.7%
WITH OWN CHILDREN < 18	33,698	30.6%
FEMALE HOUSEHOLDER (NO HUSB)	26,668	24.2%
WITH OWN CHILDREN	15,818	14.4%
NON-FAMILY HOUSEHOLDS	66,951	37.8%

XP6. HOUSEHOLD INCOME 1989

LESS THAN $10,000/PCT/CU PCT	31,800	17.9	17.9
$10,000 - $14,999	16,784	9.5	27.4
$15,000 - $24,999	33,988	19.2	46.6
$25,000 - $34,999	29,828	16.8	63.4
$35,000 - $49,999	30,575	17.3	80.7
$50,000 - $74,999	22,866	12.9	93.6
$75,000 - $99,000	6,246	3.5	97.1
$100,000 AND OVER	5,070	2.9	
MEDIAN/AVERAGE	$26,713		$33,510

XP7. FAMILIES BY # WORKERS COUNT/AVG FAMILY INCOME 1989

0 WORKERS	14,456	$19,511
1 WORKER	32,098	$30,057
2 WORKERS	50,115	$46,782
3+ WORKERS	13,537	$57,710

XP8. OTHER INCOME MEASURES

MEDIAN/AVG FAMILY INCOME	$32,969	$39,676
PER CAPITA INCOME/NON-GRP QTRS	$13,799	$13,970
PERSONS BELOW POVERTY LEVEL	65,381	15.3%
PERSONS BELOW 50% OF POVERTY	34,239	8.0%

XP9. LEVEL OF EDUCATION

TOTAL PERSONS AGE 25+	284,971	100%
LESS THAN 9TH GRADE	19,796	6.9%
9TH TO 12TH GRADE, NO DIPLOMA	40,615	14.3%
HIGH SCHOOL GRAD. (OR EQUIV)	85,936	30.2%
SOME COLLEGE, NO DEGREE	60,715	21.3%
ASSOCIATE/BACHELOR'S DEGREE	57,254	20.1%
GRADUATE OR PROFESSIONAL DEGREE	20,655	7.2%

XP10. UNEMPLOYMENT: CIV LAB FORCE

TOTAL CLF: UNEMPLOYED/RATE	16,560	7.3%
FEMALE: UNEMPLOYED/RATE	7,174	6.5%

XP11. OCCUPATION

TOTAL EMPLOYED PERSONS AGE 16+	211,817	100%
MANAGER. & PROF. SPECIALTY OCC	56,218	26.5%
TECH, SALES, ADMIN. SUPPORT	75,139	35.5%
SERVICE OCCUPATIONS	32,018	15.1%
FARM, FORESTRY, FISHING	1,574	0.7%
ALL OTHERS	46,868	22.1%

XH1. GENERAL HOUSING UNITS

TOTAL UNITS / OCCUPIED UNITS	201,773		177,601
% UNITS:OWNER OCC/RENTED/ VACANT	50.1%	37.9%	12.0%
SINGLE-FAMILY UNITS	127,753		63.3%
IN BUILDINGS WITH 5+ UNITS	52,747		26.1%
CONDOMINIUMS/MOBILE HOMES	4,926		2,437

XP2. YEAR STRUCTURE BUILT

MEDIAN YR BUILT/DECADE MOST BLT	1956	PRE	1940
BUILT IN BUSIEST DECADE	55,860		27.7%
BUILT 1985-MARCH 1990	16,450		8.2%
BUILT 1939 OR EARLIER	55,860		27.7%

XP3. HOUSING VALUES AND RENTS

SPEC. OWNER-OCC UNITS/ AVG VALUE	91,741	65,598
UNITS PAYING CASH REN/AVG RENT	73,781	$416
MEDIAN HOME VALUE/MEDIAN RENT	$55,700	$404

Press <RETURN> to continue, <m> to mail:

APPENDIX LL

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Case No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

v.

THE STATE OF MISSOURI, et al.,
Defendants.

MOTION OF PLAINTIFFS FOR AN ORDER APPROVING PAYMENT BY THE STATE DEFENDANTS OF FUNDS TO STUDY AND PLAN THREE VIT HIGH SCHOOLS

[Filed: Sept. 29, 1994]

Plaintiffs move this Court to issue an order requiring the State of Missouri defendants to pay to the Metropolitan Community Colleges, of Kansas City, the sum of $225,000, to fund study and planning costs for VIT high schools located one each at the three community colleges in the Kansas City area as detailed in Attachment A, the proposal submitted to the Desegregation Monitoring Committee.

SUGGESTIONS IN SUPPORT OF MOTION

At its September 20, 1994 meeting, the DMC approved a proposal developed by Magistrate Judge Robert Larsen, appointed by this Court to facilitate the development of voluntary interdistrict transfer plans. The proposal, if implemented, would create three VIT high schools, one each at Maplewoods, Penn Valley, and Longview Community Colleges. Each such high school would initially enroll 100 students as ninth graders,

possibly as early as next September. Fifty of those students at each of the VIT High Schools would be minority students from the KCMSD and fifty would be nonminority students from suburban school districts. Eventually, at the beginning of the fourth year of operation when the initial ninth graders had reached twelfth grade, the schools would each enroll 400 students, 200 minority students from the KCMSD and 200 nonminority students from suburban districts.

This motion proposed funding for planning such VIT High Schools, planning to be coordinated by the Metropolitan Community Colleges. To date, according to statements by Magistrate Judge Larsen to the DMC, this proposal has received initial support from the KCMSD, the three community colleges, the Kauffman Foundation, and from the Missouri Department of Elementary and Secondary Education, including active participation by and support from Commissioner Bartman in the informal working group which to date has met to prepare the outline of this VIT High School plan.

That working group has reached agreement on the outlines of the plan and needs now to conduct more formal planning. It is expected that this planning effort will result in a detailed proposal for consideration by this Court next Spring, in time for the plan to be implemented in September, 1995, if sufficient participation by the interested parties is assured.

Plaintiffs request this Court to approve funding for this planning effort. If the initial cooperation of the entities involved in developing this idea continues and the plan comes to fruition, it will afford an important opportunity to advance racial integration for hundreds of KCMSD minority students who have yet to benefit from this Court's 1985 order requiring State of Missouri defendants to develop a meaningful interdistrict transfer program. Six hundred minority high school students attending school outside KCMSD schools in settings equally balanced

between minority and nonminority students, is a possibility that should be seriously studied and developed.

For these reasons, plaintiffs request this Court to issue its order approving the funding for planning VIT High Schools.

Respectfully submitted,

By: /s/ Arthur A. Benson, II
ARTHUR A . BENSON II #21107
DIANNE MORITZ #32921
1000 Walnut Street, Suite 1125
Kansas City, Missouri 64106
(816) 842-7603

Attorneys for Plaintiffs

I hereby certify that a copy of the above and foregoing was faxed or mailed, postage prepaid, this 30th day of September, 1994 to:

Mr. Michael Fields (fax and mail)
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102-0899

Ms. Shirley Keeler (mail)
Blackwell, Sanders, Matheny, et al.
2300 Main Street, Suite 1100
Kansas City, MO 64141

Mr. Scott Raisher (fax and mail)
Jolley, Walsh & Hager
204 West Linwood Blvd.
Kansas City, MO 64111

Mr. Allen Snyder (fax and mail)
Hogan & Hartson
555 Thirteenth Street, S.W.
Washington, DC 20004

/s/ Arthur A. Benson II
Arthur A. Benson II

ATTACHMENT A

Law Offices
Arthur Benson & Associates

Suite 1125
1000 Walnut Street
Kansas City, Missouri 64106-2123
Telephone (816) 842-7603
Facsimile (816) 471-4553

September 6, 1994

Confidential

Dr. Eugene E. Eubanks
School of Education
University of Missouri at Kansas City
5100 Rockhill Road
Kansas City, Missouri 64110

Dear Dr. Eubanks:

I am writing to request that the Desegregation Monitoring Committee take action at its September 20, 1994 meeting on the following agenda item concerning voluntary interdistrict transfers advanced by the plaintiff schoolchildren. At the request of Judge Robert E. Larsen, who has taken the lead in developing this project, we ask that the DMC consider this matter in executive session. To that end, I am not sending copies of this letter and ask that the DMC distribute copies to the parties with the DMC's request that the subject matter be kept confidential by the parties.

We request that the DMC take no exception to the proposal to seek by motion from the District Court an order directing the State of Missouri to fund 100%, as is usual in VIT matters, of the $225,000 planning costs associated with efforts to establish VIT

high school programs at Penn Valley, Maple Woods and Longview Community Colleges for opening in September, 1995. Each such program will commence with 100 ninth grade students — one-half minority students from the KCMSD and the other half nonminority students from participating surrounding Missouri school districts. Each year thereafter, as the initial classes advance, 100 new ninth graders will enter each program. The program is intended to start small in order to iron out any unforeseen problems and, within a few years, reach the projected 400 students per school.

The high schools will be located on and operated by the three Community Colleges with the assistance of participating school districts, the Missouri Department of Elementary and Secondary Education, and the Kauffman Foundation. Students who successfully graduate from these schools will have earned some college credits and be given by the program, assistance with funding further educational efforts. The schools at Longview and Maple Woods will be geared toward the students earning post secondary degrees. The school at Penn Valley will focus on educational preparation for work.

Funding of $225,000 is requested for the planning and budgeting of this program, commencing immediately, so that the high school program may open next September. An informal working group has been meeting this summer to outline the proposal and has reached the point where formal and full-time efforts are needed to prepare the detailed pan for final consideration by this Committee and the Court early next year, in time to obtain approval, hire staff, order materials, and recruit students for enrollment next fall. The breakdown of the $225,000 is as follows:

Project director	-	$85,000	(includes fringes)
Secretarial support	-	$30,000	(includes fringes)
Consultants	-	$40,000	
Travel	-	$20,000	
Printing	-	$20,000	
Writers	-	$20,000	
Office Expenses	-	$10,000	
Miscellaneous	-	$8,000	
Office Rental	-	$2,000	

For these reasons, we request that the DMC take no exception to this request that the State of Missouri fund $225,000 in planning costs for the development of the VIT high school program.

Yours very truly,

/s/ Arthur A Benson II
Arthur A. Benson II

/AB

pc: Ms. Kathy Walter-Mack

FILED
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OFFICE OF THE CLERK

No. 93-1823

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED MAY 16, 1994
CERTIORARI GRANTED SEPTEMBER 26, 1994

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

vs.

STATE OF MISSOURI, *et al.*,
Defendants.

GENERAL MEMORANDUM AND ORDER

Background

This school desegregation case was filed in 1977 by the Kansas City Missouri School District (KCMSD), its school board and superintendent, and students of the KCMSD. Plaintiffs sought a metropolitan desegregation plan in the greater Kansas City area encompassing two states and seven counties. Named as defendants were the states of Missouri and Kansas, their state boards of education, nineteen school districts and three federal agencies. Plaintiffs alleged the numerous defendants failed to carry out their affirmative duties to eradicate segregation in the metropolitan area and have actually contributed to segregation by individual and concerted actions.

On October 6, 1978 the Court dismissed the Kansas defendants for lack of jurisdiction and realigned the KCMSD as a defendant. *See*, 460 F.Supp. 421 (W.D. Mo. 1978). Plaintiff school children filed an amended complaint on May 18, 1979 naming as defendants Mis-

souri, its Board of Education, thirteen Missouri school districts including the KCMSD, and three federal agencies seeking metropolitan desegregation and relief from the segregated conditions in the KCMSD. On July 3, 1979 the KCMSD filed a cross-claim against the state of Missouri alleging it failed to carry out its affirmative duty to eradicate the vestiges of its pre-1954 dual school system.

Before the trial to the Court commenced on October 31, 1983, the Raymore-Peculiar School District and the United States Department of Transportation were dismissed by stipulation.

On the 64th day of trial, March 6, 1984, after offering over 2,100 exhibits, calling over 140 witnesses and designating over 10,000 pages of depositions, plaintiffs rested. (*See* Tr. pp. 101-16,372). At the close of plaintiffs' case and before the KCMSD presented evidence on its cross-claim against the state, all defendants except the KCMSD moved for dismissal pursuant to Rule 41(b), Fed.R.Civ.P. This memorandum embodies findings applicable to all suburban school districts, an overview of plaintiffs' theories, and the Court's conclusions of law. Findings of fact notable to each district are in separate sections. References to the defendants in this order, unless otherwise indicated, refer to the suburban school district defendants.

The Court has reviewed the entire record, and has reached its judgment after consideration of the live testimony, the demeanor, believability and credibility of the witnesses, all of the exhibits, the designated depositions and interrogatory answers filed by plaintiffs. In addition, the Court took judicial notice from time to time of various matters and has considered all such matters in reaching its judgment. The Court has also reviewed plaintiffs' offers made both on the record and in writing and concludes there is no credible evidence that would alter the judgment rendered herein.

Even considering all the exhibits which were not admitted but merely received for the record, the Court still

concludes there is no credible or substantial evidence of a constitutional violation by these SSDs.

A study of plaintiffs' witnesses' testimony both at trial and by deposition reveals that none identified any acts of the SSDs done with the intent to discriminate on the basis of race, to contain blacks in the KCMSD, or to keep blacks out of the SSDs. Witness after witness, including witnesses who had been actively involved in the promotion of civil rights, testified that they knew of *no* acts by the SSDs that were done with a discriminatory intent. (*See, e.g.*, Lucille Bluford (Editor of the *Kansas City Call*, Kansas City's leading black newspaper) (Tr. 3125, 3127, 3129); Dr. Edward Fields (longtime black KCMSD administrator (Tr. 2076-77); James McCreary (longtime KCMSD black administrator) (Tr. 13,743); Joyce Stark (KCMSD School Board President) (Depo. at 111-12, 124-125, 150, 181); and Robert Wheeler (KCMSD black superintendent) (Depo. at 21-22, 24, 29-30, 41, 49).

Procedural Posture

The Court deferred ruling the Rule 41(b) motions of the State of Missouri and HUD. Because of this ruling, Missouri commenced its defense on April 2 and continued until April 18, 1984. When the case resumed on May 7, HUD began its defense.

In regard to HEW,* the motion was deferred on April 2 to give the Court an opportunity to more fully assess plaintiffs' evidence against it. After due consideration, and before any defense by the federal government, the Court on April 18 granted HEW's Rule 41(b) motion. Those findings of fact and conclusions of law will be set forth in a separate order.

*** The Court realizes HEW was dismantled by Congress in 1979 and was succeeded by Health and Human Services and the Department of Education. *See*, 20 U.S.C. §§ 3401-3510 (1979). However, because HEW, not the Dept. of Education, is the subject of plaintiffs' allegations, the Court will continue to refer to the agency as HEW.**

For the purposes of the Rule 41(b) motions, "[t]he Court is not to make any special inferences in the plaintiff's favor nor concern itself with whether plaintiff has made out a prima facie case. Instead it is to weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance lies." 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2371 at 224-25 (1971). The Court has made detailed findings of fact in support of its judgment, *see* Rule 52, Fed.R.Civ.P., and has applied the standards set forth in *Shull* v. *Dain, Kalman & Quail, Inc.*, 561 F.2d 152, 155 (8th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). The Court in *Shull* declared, "The district court may find the facts itself and may render judgment against the plaintiff if the Court considers that plaintiff has not made out a case, and if the district court sustains the Rule 41(b) motion, its findings will not be reversed on appeal unless clearly erroneous." *Id. See also, Lang* v. *Cone*, 542 F.2d 751, 754 (8th Cir. 1976). Based on these standards, the Court finds that plaintiffs have not proven a case against any of the suburban school district defendants. Because the Court must make specific findings as directed in Rule 52, Fed.R.Civ.P., and to aid in appellate review, *Lora* v. *Board of Education*, 623 F.2d 248, 261 (2d Cir. 1980), it has made page citations to the 65-volume transcript and 130 depositions.

All defendants except the KCMSD filed Rule 41(b) motions at the close of plaintiffs' case, and the Court's decision regarding the SSDs was entered before any defense was initiated. The Court did proceed, before a recess, with the KCMSD's cross-claim against the State of Missouri, but with the understanding that "once plaintiffs rested, they rested." (*See, e.g.*, Tr. 13,859). Despite the Court's clear pronouncement that none of the evidence adduced during the cross-claim would be considered in ruling the 41(b) motions, plaintiffs repeatedly rose during the presentation of evidence to "join in the offer" for support of its case in chief. Even if the Court were

to consider the evidence presented by the KCMSD in its cross-claim, there was nothing in that evidence that would aid plaintiffs' case against the SSDs. That evidence by the KCMSD was not persuasive to the Court insofar as it was arguably relevant to the suburban school districts.

Theories

Plaintiffs' theories involving the SSDs are three-fold: first, that the SSDs, as agents of the state, were guilty of operating a regional system of segregated schools that centered on and impacted Kansas City with blacks and made the suburbs whiter before 1954; second, that the SSDs failed in their affirmative duty to eliminate the vestiges of the dual school system; and third, that the SSDs are liable for the effects of actions by the KCMSD and other defendants and can therefore be included in an interdistrict remedy. Essentially, plaintiffs seek the realignment or consolidation of the existing KCMSD and surrounding SSDs, which would purportedly produce an integrated educational environment for each child attending school in the KCMSD and surrounding school districts. These theories, when considered in light of the evidence and the prevailing legal standards, must be rejected.

Because this is an interdistrict case, all the evidence comprising this voluminous record must be weighed by that standard. Intradistrict cases are inapplicable. The linchpin of an interdistrict case, as declared by the Supreme Court, is whether there has been a racially discriminatory act by each defendant that substantially caused segregation in another district. *Milliken* v. *Bradley*, 418 U.S. 717, 745 (1974) (Milliken I).

Boundaries

Plaintiffs seek to racially balance the public school population in the metropolitan area. As *Milliken* explained, however, plaintiffs' only right is to attend school in a unitary school system in the district in which they

reside, not to attend school in a racially balanced metropolitan area. 418 U.S. at 746-47. There is a tremendous distinction between looking at racial imbalance as evidence of a segregated school system in an *intra*district case and equating racial imbalance on an *inter*district basis to a constitutional violation: "[T]he use of significant racial imbalance in schools *within* an autonomous school district as a signal [in intradistrict cases] which operates to shift the burden of proof is a very different matter from equating racial imbalance [between two school systems in an interdistrict case] with a constitutional violation calling for a remedy." *Milliken*, 418 U.S. at 741 n.19 (emphasis added). *See also, Lee* v. *Lee County Board of Education*, 639 F.2d 1243, 1254-55 (5th Cir. 1981). This being an interdistrict case necessarily requires rejection of intradistrict presumptions.

In order for plaintiffs to prevail, they had to prove that the school district boundaries as originally established or later maintained, evidenced a racially discriminatory motivation; inferences from discriminatory impact would not suffice. *Washington* v. *Davis*, 426 U.S. 229 (1976). Lack of proof of discriminatory intent in the establishment or changing of any school district boundary lines requires the Court to reject plaintiffs' arguments and effectively distinguishes the interdistrict cases granting relief upon which plaintiffs rely. *Cf. Morrilton School District No. 32* v. *United States*, 606 F.2d 222, 225-27 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071 (1980); *United States* v. *Missouri*, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975) (the *Kinloch* litigation); and *Haney* v. *County Board of Education*, 410 F.2d 920 (8th Cir. 1969) (pre-Milliken). All of these Eighth Circuit cases evidenced racial gerrymandering, an action specifically recognized in *Milliken* as justification for an interdistrict remedy. 418 U.S. at 745. It is axiomatic, however, that absent a constitutional violation in one district producing a significant segregative effect in another district, the

boundaries of separate and autonomous school districts must be respected. *Id.* at 745-46.

The hub, therefore, of plaintiffs' argument is that the SSDs are not separate and autonomous but are instead agents of the state whose boundaries are constantly disregarded and can therefore be ignored in fashioning an appropriate remedy. Guided once again by *Milliken*, plaintiffs' position is rejected:

> Boundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. (citations omitted).

418 U.S. at 741-42. Applying the local control measure to Detroit, the Supreme Court concluded there were no constitutional violations by those districts that would justify "consolidation of 54 independent school districts historically administered as separate units into a vast new super school district." 418 U.S. at 743. A review of school district existence in Missouri leads the Court to conclude the SSDs are more autonomous than those discussed in *Milliken* and numerous other desegregation cases.

Local Autonomy

Establishment of school district boundaries in Missouri is controlled at the local level to a greater degree than in Michigan. *Compare* Mo. Rev. Stat. §§ 162.222, 162.441 (1978), § 162.431 (Supp. 1983) (requiring approval of the qualified voters in each school district affected) *with*

Bradley v. *Milliken,* 484 F.2d 215, 247-48 (6th Cir. 1973) (Michigan school districts are not highly locally autonomous because of various Michigan statutes giving the Michigan State Board of Education the power to change boundary lines and to merge school districts), *rev'd,* 418 U.S. 717 (1974). The state of Missouri does not have the power to require a merger or consolidation of school districts. Based upon a review of Missouri statutes and those cited by the Supreme Court in *Milliken,* 418 U.S. at 742, and those relied on by the Sixth Circuit in *Bradley* v. *Milliken,* 484 F.2d 215, the Court finds that Missouri school districts have *more* authority and autonomy than Michigan school districts. The independence of the local districts in Michigan was sufficient for the Supreme Court to conclude interdistrict relief was improper.

The Court finds that school districts in Missouri are governed by locally elected boards of education and have the authority and autonomy to control boundaries, curriculum, finance and administrative matters. Based on these facts, and on a review of the facts relied upon in *Lee* v. *Lee County Board of Education,* 639 F.2d 1243, 1256 (5th Cir. 1981), the Court finds that the school districts in Missouri have at least as much independence and autonomy as school districts in Alabama where interdistrict relief was denied.

Public education in Missouri is structured differently than public education in Indiana. In Indiana, the state has far more authority and control over school district boundaries. For instance, in *United States* v. *Board of School Commissioners,* 637 F.2d 1101, 1124-25 (7th Cir), *cert. denied,* 449 U.S. 838 (1980), the court found that legislation affecting the boundary lines of the Indianapolis Public Schools had been enacted with a racially discriminatory purpose. There is no such evidence here.

Public education in Missouri is also structured differently than public education in Delaware. There, the state has

substantially more authority and control over local school district internal matters and school district boundaries. *See, e.g., Evans* v. *Buchanan,* 393 F.Supp. 428, 438 (D. Del.), *aff'd mem.* 423 U.S. 963 (1975). In *Evans,* the court determined that the enactment of the Education Advancement Act violated the Equal Protection Clause of the 14th Amendment.

Likewise, public education in Missouri is structured differently than public education in Kentucky. There, the court referred to school district lines as being "artificially drawn." *Newburg Area Council* v. *Board of Education,* 510 F.2d 1358, 1360 (6th Cir. 1974), *cert. denied,* 421 U.S. 931 (1975). A Kentucky statute authorized reconsolidation of school districts within a single county even without consent of the county school board. Also, the court found evidence that the school district boundaries had been ignored in the past for the purpose of aiding and implementing continued segregation.

There was no credible evidence that any of the boundaries of any defendant school district were established or maintained with any racially discriminatory intent. The only evidence regarding boundaries concerned the KCMSD and Independence, over the Van Horn attendance area, and is discussed *infra.* The boundaries have been properly established and maintained by each SSD, and each district manages its own school affairs within its own boundaries. Establishment of school district boundaries is a local matter in Missouri, and the Court finds that each of the boundaries of the school districts involved in this case were established through local initiatives, with no taint of any racial animus. This fact alone distinguishes the instant case from many upon which plaintiffs rely including *Newburg, Evans, Hoots* v. *Pennsylvania,* 672 F.2d 1107 (3d Cir.), *cert. denied,* 103 S.Ct. 55 (1982) and *Morrilton School District No. 32* v. *United States,* 606 F.2d 222 (8th Cir. 1979), *cert. denied,* 444 U.S. 1071 (1980).

Reviewing plaintiffs' evidence, the Court is not persuaded by the testimony of Raphael Nystrand to the effect that Missouri school districts do not have local control of education. Mr. Nystrand based his opinion on standards set by the federal government and private accrediting agencies, entities over which the state of Missouri has no control. (Tr. 6177-78). Actions by these entities have no effect on the autonomy of Missouri school districts. Moreover, Mr. Nystrand agreed that no single tradition in public education was more deeply rooted than local control. (Tr. 6178). Indeed, he agreed that the principles of local control are a significant theme in school politics across the nation. (Tr. 6195-96).

The Court finds that local school districts in Missouri have the following characteristics, powers and authority:

1. School districts are governed by local boards of education that are elected by the voters residing in the district. (Tr. 6179).

2. School districts, not the state, hire superintendents and teachers. (Tr. 6179-80).

3. School districts, by a vote of the residents, establish their own tax levy. (Tr. 6180; P. Ex. 1737).

4. Reorganization is a decision made by the local school district; a reorganization plan could be submitted to the voters of a school district even though the Missouri State Board of Education did not approve the plan and the voters could adopt or reject the reorganization. (Tr. 6184).

5. The Constitution of Missouri, Art. 3, § 20, prohibits the General Assembly from enacting "any special law changing the boundaries . . . of any school districts." (Tr. 6181).

6. Local school districts have the plenary power to establish school attendance zones (e.g. P. Ex. 2267).

7. Local school districts determine whether to provide transportation for their students. (Lowell Depo. at 6).

The Court also finds that the Office for Civil Rights, the federal agency in charge of monitoring civil rights compliance of local school districts, has always recognized the local autonomy of Missouri school districts and treated the school districts accordingly. (High Depo. Vol. I at 65, 70, 110-111; Ward Depo. Vol. I at 30).

Another strong indication supporting the Court's conclusion that the local school boards are autonomous entities is the fact that the school boards are not afforded Eleventh Amendment immunity as an agent of the state but must be sued instead in their own names. *Mount Healthy City School District* v. *Doyle*, 429 U.S. 274 (1977); *Miener* v. *Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 103 S.Ct. 215 (1982).

The autonomy of the local districts is evidenced in the pre-1954 period by each local school district deciding whether to educate their black students, if any, at schools within the district or to transfer them to schools in another district. (Tr. 372, 378, 622, 624, 696-97, 871-72, 1084-86, 1124, 1126, 1136-1138, 1154, 1199, 5837 and P. Ex. 1814). Local school districts also made the decision whether to educate white students at schools within their district, to operate a high school in the district, or to transfer their high school students to high schools in another district. (Tr. 335-36). A school district, in its discretion, could refuse to accept transfer students, both black and white and usually considered tuition costs and space in making such decisions. (P. Ex. 1768, P. Ex. 1769). Each school district receiving transfer students established their own rules or regulations to apply to those students' education. (P. Ex. 1774).

Having reviewed hundreds of minutes from various boards of education in this case, the Court is fully convinced, and hereby finds, that each of the school districts

is a locally autonomous and independent entity. Because each defendant district is independent and autonomous from the state of Missouri, and from all other school districts, none has an affirmative duty to merge with other districts. None can be held vicariously liable for the acts of the state, federal government or other entities. And, absent a finding of an interdistrict constitutional violation, none can be made a part of an interdistrict remedy.

In regard to the first theory, plaintiffs point to interdistrict student transfers made by some of the SSDs pursuant to state mandate before *Brown* v. *Board of Education*, 349 U.S. 483 (1954) (*Brown I*). The fact that such transfers were made before the Supreme Court declared separate schools unconstitutional does not entitle plaintiffs to relief. Instead, plaintiffs had to prove first that the segregated schools existing before 1954 were the direct and substantial cause of blacks leaving *each* defendant district; second, assuming that occurred, that it had a significant segregative effect in the KCMSD. *See*, 418 U.S. at 744-45; *Lee*, 639 F.2d at 1256 ("there must be clear proof of cause and effect and a careful delineation of the extent of the effect"). Plaintiffs' proof was weak, speculative and in any event *de minimus*.

The "vestiges" theory also fails. First, the affirmative duty to eliminate vestiges is premised upon the notion that each defendant district produced the segregation sought to be eliminated and therefore has a duty to undo its damage. Second, the affirmative duty plaintiffs would impose (assuming one exists) is far more expansive than that required by the Constitution. The Court in *Milliken* articulated the parameters of a school district's obligation when it declared, "the constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system *in that district*." 418 U.S. at 746. (emphasis added). Thus, the KCMSD and each SSD has an obligation to provide a unitary school system in *their* respective districts. Failure to dissolve, merge, legislate, cooperate or entice blacks into their districts does not, as

plaintiffs suggest, evidence a constitutional violation for which this Court can mandate an interdistrict remedy. Such actions may be urged by social scientists but that does not create a constitutional duty. While minds, like parachutes, work best when open, the Court cannot judicially create openmindedness nor impose an obligation absent a constitutional violation.

In regard to the "effect" theory, plaintiffs suggest in their amended complaint that, "as agents and subdivisions of the state, the defendant school district . . . must be included in an interdistrict remedy, even absent any finding that they have committed specific violations on their own initiative." Such a "no-fault" position was argued by Justice Marshall dissenting in *Milliken*:

> Nor should it be of any significance that the suburban school districts were not shown to have themselves taken any direct action to promote segregation of the races. Given the state's broad powers over local school districts, it was well within the State's powers to require those districts surrounding the Detroit school district to participate in a metropolitan remedy.

418 U.S. at 807. The majority considered and rejected this position demanding instead there be a violation, or *cause*, by each defendant district as well as an interdistrict *effect*:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, *it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district*. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where

> the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. *Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.*

418 U.S. at 744-45 (emphasis added).

While it may be within the province of another Court to review and rewrite the standard, it is this Court's obligation and duty to apply the law, as presently composed, to the facts of this case. That application compels the Court to reject plaintiffs' theories and grant the suburban school district defendants' motions for judgment pursuant to Rule 41(b).

I. Pre-1954 Evidence

The defendants admitted, and the Court judicially noticed, that Missouri mandated segregated schools for black and white children before 1954. *See,* MO. CONST. Art. IX, § I(a) (1945) (rescinded 1976) *and* §§ 163.130, 165.117 R.S.MO (repealed 1957). These provisions were not immediately and formally abrogated after the *Brown* decision was announced; however, the State's Attorney General issued an Opinion in 1954 declaring them unenforceable. (P. Ex. 2232). The statutes were repealed in 1957 and the constitutional provision was finally rescinded in 1976. This historical background is recounted in more detail by the courts in *Adams* v. *United States,* 620 F.2d 1277, 1280-81 (8th Cir.) *cert. denied,* 449 U.S. 826 (1980); and *United States* v. *Missouri,* 363 F.Supp. 739, 746-47 (E.D. Mo. 1973) *aff'd* 515 F.2d 1365 (8th Cir.) *cert. denied,* 423 U.S. 951 (1975).

Plaintiffs argued that in response to this mandate, Missouri through its agents, the SSDs, maintained a regional

black interdistrict school system causing blacks to leave the SSDs and migrate to Kansas City in search of an education. Plaintiffs' argument is not supported by the law or the evidence. While the law required separate schools to be provided, it did not require separate school districts. *Compare, Bradley* v. *School Board,* 462 F.2d 1058, 1065 (4th Cir. 1972) *aff'd* 412 U.S. 92 (1973). The manner in which blacks in any defendant district were educated was solely a matter of local control and within the discretion of the local school district. (Tr. 5837; P. Ex. 1814). As discussed *supra,* each defendant district was, and is, an autonomous entity not, as plaintiffs suggest, an agent of the state.

The major support for plaintiffs' case came from various lay witnesses and the opinions of an expert historian, Dr. Anderson. According to Dr. Anderson, segregated schools were legally mandated for most or all of the years from 1889 to 1954. (Tr. 4223-24). This fact, so plaintiffs' theory goes, would compel blacks in the three-county area surrounding Kansas City to migrate to schools in Kansas City in significant numbers. From 1910 to 1920, a time when Dr. Anderson testified the depopulation had begun in earnest, the number of blacks enumerated in the three-county area decreased by 287 people yet the number of blacks enumerated in the KCMSD increased by 6,676 people. From 1930 to 1960, the black population in the three-county area (excluding the KCMSD) decreased by approximately 550 people. During that same time period, the black population in the KCMSD increased by approximately 45,000 people. (Tr. 4573-74). Even assuming the entire decrease in the three-county area can be accounted for only by people leaving and going to Kansas City because of the dual school system, the Court finds the impact of that movement on the KCMSD enumeration insignificant. (P. Ex. 53E[sub]).

The Court is not persuaded by Dr. Anderson's opinion that the greatest number of the blacks coming into

Kansas City from 1865 to 1954 did not come from the deep south but came instead from inside Missouri. (Tr. 4458-59).

The Court finds that contrary to Dr. Anderson's opinion, blacks in the three-county area outside of Kansas City and the towns of Liberty, Independence and Excelsior Springs were mostly rural, farm-dependent families. (Tr. 331, 454, 526, 796, 901-906, 935, 952, 1008, 1052, 1089, 1100-1103, 1105, 3139, and 3165-66).

A school district's enumeration counts the number of people between the ages of six and twenty residing in the district. (Campbell Depo. at 165). In 1881 blacks comprised 13.6% of the KCMSD enumeration while in 1954 blacks comprised 14.0% of the KCMSD enumeration, (P. Ex. 53E[sub]), an increase over the entire period of only .4%. (Tr. 4215).

Plaintiffs' evidence of transfers from suburban school districts to the KCMSD from 1900 to 1954 resulted in a total of only 251 students. (Tr. 4557-59). The Court finds that as of 1954, less than .5% of the total number of black students enrolled in the KCMSD black schools were from other districts and included students from non-party defendant districts. (Tr. 2043). The number of black students that attended Lincoln High School prior to 1954 from school districts other than the KCMSD was insignificant when compared to the total number of black students that attended Lincoln. (Tr. 1773). In 1954-55, the black enrollment in the entire KCMSD was only 18.8%. (Def. Ex. K2). And for every year prior to 1970, the enrollment in the KCMSD remained majority white. (Tr. 3352, D. Ex. K2).

Plaintiffs attempted to bolster their depopulation theory by introducing a list of 44 names compiled by Marvin Robinson purporting to show individuals that were transferred to Lincoln High School before 1954 and subsequent to their transfer lived in Kansas City. The Court finds the list does not show a connection between black

schools in Kansas City and the movement of blacks into Kansas City. As made apparent on cross-examination, a number of the people on the list now live in Independence or other places throughout the United States; some people on the list lived in Kansas City for only a short period of time; some did not even move to Kansas City until after 1954. Nor was there credible evidence as to why these 44 people moved to Kansas City. (Tr. 2163-64, 2168, 2170-81). The total is insignificant in any event.

The most significant pre-1954 increases in the KCMSD black enumeration took place during the World War I (from 1910 to 1920 an increase of 6,676) and World War II periods (from 1940 to 1950 an increase of 3,223). Dr. Anderson admitted that the world wars were factors that brought blacks into the KCMSD, and the Court finds that the substantial increases in the KCMSD black population are in large part due to the unusual economic and employment ramifications of the world wars and intervening depression. (Tr. 5932-34, 9988-90).

The most rapid and substantial increases in black students in the KCMSD occurred after 1954 and through the 1960's. (Tr. 1797-98, P. Ex. 2638). Dr. Anderson, who admitted that he could not accurately quantify the effect the prior segregated schools had on black people moving (Tr. 4332-34), testified that jobs and economics were certainly factors causing blacks to move to Kansas City. (Tr. 4486, 4605). Plaintiffs' black lay witnesses also confirmed the importance of job location and economic opportunity in their decisions to move. (Tr. 595, 600, 676-78, 713, 796, 911, 1052, 1089, 1103, 1111, 1163, 1307, 1312, 1318, 1552, 1579-80, 1680-81, 1728, 2781, 3214, and 3267). The Court finds that jobs and economic opportunity were primary motivators for blacks leaving the three-county area and moving to Kansas City and elsewhere, and that any motivation resulting from segregated schools was *de minimis* and insignificant when compared to those primary motivating factors. The Court further finds that transferring blacks to the KCMSD

under the prior segregated school system is not a cause of the present racial distribution of the population in the three-county area. Many of plaintiffs' lay witnesses demonstrated that they did not move to where they were transferred to school. (Tr. 372, 565, 632-36, 676-80, 714, 719, 841, 1216-17, 1334-35, 1358-60, 1385-86, 1664-65, 2587-88, 2699-2704, 3170-73).

The Court also observes that the absence of black schools in any of the defendant districts did not discourage black families from outside (or from within) Missouri from moving to and living in those districts. (Tr. 1153-54, 1213-14, and 1252-54).

Furthermore, plaintiffs have not persuaded the Court that any vestiges or significant effects of the pre-1954 dual school system remain in any of the SSDs. Similarly, the Court is not convinced that any one of the school district defendants was involved in any interdistrict violation that had a substantial segregative effect in the KCMSD as required by *Milliken*. On the contrary, the Court finds that each of the defendant suburban school districts disestablished its pre-1954 school system with deliberate speed and that all vestiges of that system have long since ceased to exist. Unlike *Bradley*, 338 F.Supp. at 167-176, there was not massive resistance to the *Brown* decision. Still, in that case, interdistrict relief was denied. 462 F.2d 1058, *aff'd* 412 U.S. 92. Specific findings regarding each district's desegregation efforts and unitary status are contained in individual sections *infra*.

II. Duty To Eliminate "Vestiges"

School District Association

It is plaintiffs' argument that the SSDs had a constitutional obligation to racially balance the metropolitan area —had an interdistrict vehicle, the Cooperating School Districts Association of Suburban Kansas City available— and failed to seize the opportunity. Plaintiffs also implied there was some racial motivation in the Association's actions. There is absolutely no evidence to justify plaintiffs' allegations.

The Association was formed in 1971 (Tr. 4819) with its primary purposes being to impact on state funding legislation and to save money through cooperative purchasing. (Tr. 4823). There is no evidence, however, that any school district member relinquished local control, joined with racial animus or promoted any program having a racial effect. The KCMSD was eligible to join. (Tr. 4824).

Cooperative efforts among school districts does not negate their autonomy. *Taylor* v. *Ouachita Parish School Board*, 648 F.2d 959, 965 (5th Cir. 1981); and *Lee*, 639 F.2d at 1256-57. And, as discussed *supra*, there is no *duty* on the part of any SSD to cooperate in the racial balancing of the metropolitan area.

The Sales Tax

Plaintiffs have pointed to the cooperation of the school districts with the City of Kansas City in regard to sales tax proceeds as evidence of interdistrict cooperation on subjects other than desegregation. How this sharing of revenues adds to plaintiffs' case is beyond the Court. There is no affirmative duty to refrain from racially neutral cooperative efforts—particularly one that inures to the benefit of the KCMSD's students. Plaintiffs intimated, but did not prove, that some of the SSDs were racially motivated in their concerns regarding the "strings" attached to the revenue. The Court finds otherwise.

The voters of Kansas City approved a ½% sales tax on August 16, 1974 with the revenues generated to be distributed proportionately to all school districts partially or wholly within the City of Kansas City. (P. Ex. 1763, 1767). That included the KCMSD and all SSDs with the exception of Blue Springs and Fort Osage. (P. Ex. 1767 and 1999). It also included three districts that are not

party defendants. (P. Ex. 1767). The sales tax was used to generate money because the KCMSD had not been able to pass a bond issue or tax levy since 1965. (P. Ex. 1763).

Each recipient school district entered into a Cooperative Agreement with the City of Kansas City. (*See, e.g.*, P. Ex. 1746). The City Council Resolution not to interfere with the administration of any school district in the distribution of funds (P. Ex. 1763, 1767), was not the result of racially motivated concerns by the primarily white SSDs; instead, the resolution was in response to a constitutional challenge of the sales tax. (The Missouri Constitution, Article III § 40(24) prohibits passage of special laws regulating the management of public schools. The Missouri Supreme Court has held this provision to apply to municipal legislation, *Mathison* v. *Public Water Supply District No. 2*, 401 S.W.2d 424 (Mo. 1966), thereby requiring the "no strings attached" disclaimer.)

In each of the years the revenues were distributed, the KCMSD received at least 59% of the total. That amounted to $12,612,339.00 while Hickman Mills, recipient of the second largest share, received only $2,645,521.00. (P. Ex. 1746, 1767, 1999).

The Court finds there was no discriminatory intent nor result by any defendant district. The sharing of sales tax revenues by school districts is simply not a constitutional violation. *Taylor* v. *Ouachita Parish School Board*, 648 F.2d 959 (5th Cir. 1981).

Juvenile Homes

Plaintiffs' evidence adduced the fact that there are juvenile court homes located in several of the SSDs which homes were once operated by the KCMSD. Plaintiffs also allege the children remained segregated by race until the early 1960's.

Even if the Court accepts plaintiffs' position as true, there is still no interdistrict violation rising to the level

required by *Milliken* to impose the remedy sought. It is the Jackson County Court, not the SSDs, that selected the sites for the schools. It is the Juvenile Court that commits children to the schools, not the KCMSD or any other district; and there is absolutely no showing that the schools have had a racial impact on the KCMSD or any SSD.

While the Court may agree that the county courts are state entities, that fact does not tend to establish a constitutional violation by any SSD.

Special Education

As further evidence of the fact that the SSDs are not autonomous, plaintiffs point to the interdistrict arrangements made for special education. Again, plaintiffs' position is that the school districts can and do cooperate in the provision of educational services but refuse to cooperate to desegregate the metropolitan area. Once again the Court concludes that interdistrict operation of specialized programs does not compromise the SSDs' autonomy nor evidence racial discrimination. While the districts had the legal capacity to allow or participate in interdistrict transfers, they had no legal obligation to do so.

As discussed in the sections regarding individual districts *infra*, the school districts contract among themselves to provide for the education of the handicapped and especially needy children living in their respective districts. Those contractual arrangements are done pursuant to state law which imposes a specific duty on the districts to provide a gratuitous education to all handicapped and severely handicapped children residing in their district. *See*, § 162.670 *et seq.*, R.S. Mo. The federal government promotes "free appropriate public education" for handicapped children by providing states with financial assistance. 20 U.S.C. § 1411 *et seq*. Because of the proportionately small number of handicapped children residing in each district, they must cooperate in the exchange

of students and services to meet their statutory obligations in an administratively efficient manner. The arrangements made, however, are not racially discriminatory nor do they abrogate the districts' autonomy.

The fact that interdistrict cooperation of this nature is possible may have relevance at a remedy stage, but it does not assist plaintiffs in proving interdistrict constitutional violations.

Vocational Education

Plaintiffs also alleged the establishment and operation of area vocational technical schools in the Kansas City area was purposefully designed to perpetuate racial segregation. Plaintiffs also point to the interdistrict cooperative nature of the vocational schools. A review of the evidence, however, leads the Court to conclude that the vocational educational system in the Kansas City area is not an interdistrict constitutional violation.

Beginning in 1965, the state of Missouri began distributing federal funds to local school districts desiring to provide vocational technical training for their students through the federal Area Vocational Technical School (AVTS) program. (P. Ex. 1552). Each district, in its discretion, determined whether or not to participate in the program and in what manner their participation would occur. (Drake Depo. at 130-131). Those individual decisions did not dilute the districts' autonomy.

In 1965, the KCMSD was the first district in the area to request it be designated as a "host" district to operate an AVTS facility. (Tr. 6359, Drake Depo. at 20). The KCMSD did not invite nor seek to associate with any other district in its AVTS; instead, it sought explicitly to serve only those students attending school in its district. At that time, it was a majority white school district with a student population of 50,000 including ten high schools which would operate as "sending" schools to the proposed

AVTS. (Tr. 6221, 6360-62; D. Ex. K2). The fact that other districts do not participate in KCMSD's AVTS is not a vestige of any prior dual school system.

The Fort Osage AVTS opened in 1968. Fort Osage, Blue Springs, Grain Valley and Oak Grove participate in the Fort Osage AVTS; the latter two districts are not parties to this litigation. (P. Ex. 1709, 1733, Gragg Depo. Vol. I at 90-91, Drake Depo. at 93). The KCMSD did not request that Fort Osage participate in its AVTS or even suggest such a possibility was available. (Bartow Depo. at 100, Gragg Depo. Vol. II at 93-94, 96). Fort Osage did not investigate participation with the KCMSD due to the long distance between the KCMSD and Fort Osage. (Bartow Depo. at 98, 108). The Court finds the establishment of the Fort Osage AVTS was not motivated by a desire to discriminate against minorities but was based instead on sound educational and organizational reasons. It is far removed from the KCMSD and would have been impractical for Fort Osage and Blue Springs to participate in the KCMSD AVTS.

In 1971, Raytown was approved for designation as an AVTS. (P. Ex. 1537). Six school districts, Center, Grandview, Hickman Mills, Independence, Lee's Summit and Raytown, with a total of eight high schools enrolled students at the Raytown AVTS. (P. Ex. 453). There is no evidence that KCMSD participated in the discussions about Raytown's AVTS formulation (probably because KCMSD had already sought and obtained designation as an area to maintain an AVTS). The Court finds the fact that KCMSD did not participate in these discussions was not related to race or an intent to discriminate. (Tr. 2057).

KCMSD's former acting superintendent, Dr. Fields, testified that he was involved in vocational education and he knew of no AVTS designation that was deliberately sought, designated or maintained to perpetuate segregation. (Tr. 2057). In fact, he testified that the various

AVTS's were established to foster administrative convenience and to prevent overlap. (Tr. 2057).

North Kansas City School District does not participate in any vocational educational technical program with another district or in an AVTS. (Doolin Depo. Vol. I at 47-48, Waier Depo. at 127-29). Park Hill participates in the Platte City AVTS and Platte City School District is not a party to this litigation. (P. Ex. 34). Liberty participates in the Excelsior Springs AVTS which is another school district not a party to this case. (P. Ex. 34).

Dr. Nystrand gave testimony that there were no sound administrative reasons for the current configuration of the AVTS's in the metropolitan area. He admitted, however, that some great distances existed between the KCMSD's AVTS and major towns in other districts that participate in outlying AVTS centers. (Tr. 6215). And, there are school districts geographically further removed from KCMSD currently not parties to the suit who participate with some defendants in an AVTS facility. (P. Ex. 1709, Gragg Depo. Vol. II at 43).

The only testimony which contended that the AVTS's were operated in a discriminatory manner came from Dr. Charles Benson. Dr. Benson, who the plaintiffs tendered as an expert in the financing of vocational education, did not claim to know of any racial discrimination but he alleged financial discrimination. Although Dr. Benson found fault with the way the state of Missouri vocational education funding formula impacted on the KCMSD, he admitted it had been approved by the federal government. (Tr. 6359). The Court notes in fact that Dr. Benson found fault with all 50 states' funding formulas for vocational education. (Tr. 6384). There is no evidence demonstrating that any defendant district was trying to contain any racial group within KCMSD by virtue of the use of funds obtained through the formula. Furthermore, the $115.38 per student that the KCMSD received from the federal

government in fiscal year 1982 was far more than any suburban defendant AVTS received. (Tr. 6373).

The Court finds that plaintiffs have not demonstrated a constitutional infirmity in the state's formula for distributing vocational educational monies under the standards of *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1 (1973). There has been no evidence that vocational educational monies have been distributed with a purposefully discriminatory motive or effect.

Vocational education in the Kansas City metropolitan area is unitary and is not a vestige of any prior dual school system. The area schools were established without discriminatory intent and there was no credible evidence that their operation had the effect of segregating students on the basis of race. Unlike St. Louis, there is no separate "Special District" for vocational education drawn along racially segregative lines. See *Liddell* v. *Board of Education,* 491 F.Supp. 351, 353 (E.D. Mo. 1980), *aff'd,* 667 F.2d 643, 651 (8th Cir.) (Liddell III), *cert. denied,* 454 U.S. 1081, 1091 (1981). The Court finds that the operation of vocational education in the Kansas City metropolitan area is not an interdistrict constitutional violation. Nor do the districts' cooperative abilities in this regard support a finding of liability.

Merging Opportunities

Even if there were a duty on the SSDs to promote racial balance in the metropolitan area, plaintiffs' evidence fails to demonstrate an intent on the part of the SSDs to racially discriminnate in their various positions nor is there evidence, in many instances, that the measures raised had or would have had an integrative effect.

House Bill 171

House Bill 171 (P. Ex. 977) is an example of such a measure. It was passed by the Missouri General Assembly

and signed by the Governor in 1957. 1957 Mo. Laws 454. Prior to the enactment of H.B. 171, § 165.563 provided in part:

> Every city in this state now having or which may hereafter have *500,000* inhabitants or over, together with the territory now within its limits, or which may in the future be included by any change thereof, shall be and constitute a single school district. . . .

Mo. Rev. Stat. § 165.563 (1949) (emphasis added). H.B. 171 amended this section so that it would apply to Missouri cities having *700,000* or more inhabitants.

The legislative history demonstrates that H.B. 171 did not amend the population level prescribed by § 165.563 for the first time; the section's predecessor was enacted in 1897. Act of March 23, 1897, § 2, 1897 Mo.Laws 221 (1897). It provided that a city exceeding 300,000 persons shall constitute a single school district. That statute was then amended in 1909 to change the population level from 300,000 to 500,000 persons. Act of May 28, 1909, § 1, 1909 Mo.Laws 846 (1909). There is no evidence nor did plaintiffs argue that the Missouri General Assembly chose to establish the population level at 300,000 in 1897 for racial reasons or to amend it to 500,000 in 1909 for racial reasons.

There are additional reasons supporting the Court's finding that House Bill 171 was not discriminatorily enacted: First, Representative J. McKinley Neal, a black representative from a legislative district within the KCMSD (Tr. 4653), voted for H.B. 171. Representative Neal had long been active in promoting civil rights organizations such as the NAACP and the Urban League (Tr. 4653), and he introduced the legislation which led to the creation of the Missouri Commission for Human Rights in 1957. (Tr. 3130). Second, not one state representative or senator, black or white, cast a vote against H.B. 171. (SSD Ex. 4). Third, the Court finds that the state

of Missouri enacted H.B. 171 for the same reasons that it had prescribed a population level in 1897 and amended that figure in 1909. Its purpose was to avoid administrative confusion and problems resulting from annexations or population changes. Fourth, the KCMSD designed the amendments prescribed by H.B. 171 and supported the passage of the bill. (Tr. 4648, 6222). The Court finds that the KCMSD supported H.B. 171 because of bonding and operational problems that would result if the KCMSD automatically expanded and become coterminous with the City of Kansas City. (Travis Depo. at 93-100). Furthermore, the black enrollment in the KCMSD was stable during this period; in 1956, the student population was 22.3% black and in 1957 it was 22.8% black. (Tr. 2048). Finally, Representative Frank Mazzucca, whose district included part of the KCSMD (Tr. 4651-52), introduced H.B. 171 in the Missouri General Assembly. (SSD Ex. 4). His actions were not motivated by racial concerns.

The population of the City of Kansas City did not exceed 500,000 in the 1960 census. (Tr. 13,315-16). Therefore, H.B. 171, changing the population trigger to 700,000, did not affect the boundaries or racial composition of any defendant school district including the KCMSD. Furthermore, the Court notes that significant annexations in eastern and southern Jackson County and Clay County to the City of Kansas City occurred after H.B. 171 was enacted. (P. Ex. 425). There has been no showing by plaintiffs that the KCMSD's present racial composition would have been different had H.B. 171 not been passed.

The KCMSD annexed several all-white school districts following 1954, including Sugar Creek in 1955, Rock Creek in 1957, Pitcher-Fairview in 1958, and Pleasant Valley in 1973. (Tr. 1974, 6120; P. Ex. 407). The Court finds that based on this evidence that even after the *Brown* v. *Board of Education*, 347 U.S. 483 (1954),

decision, and after the enactment of H.B. 171, the KCMSD was annexing school districts and gaining white students through those annexations. The Court must therefore conclude that H.B. 171 was not enacted with the intent to concentrate black students within the KCMSD nor did it constitute an intentional interdistrict violation.

Spainhower and Related Proposals

Plaintiffs also point to the Spainhower Commission's report and other metropolitan proposals as evidence of racial animus and a derogation of the SSDs' duty to eliminate the vestiges (by promotion) of a dual school system.

The Spainhower School District Reorganization Commission report of 1979 contained multifaceted recommendations involving, for example, finance, boundaries, and various levels of local control. The Court finds that the General Assembly did not enact the recommendations of the Spainhower Commission because it desired to maintain Missouri's strong tradition of local control over public education. (Tr. 6095, 6967; Spainhower Depo. at 35-36, P. Ex. 497, 1728, 2172 and 2192). The statewide nature of the Commission's recommendations would have substantially reduced local control.

There was no credible evidence on which the plaintiffs may rely to attempt to support their allegation that racial concerns led to the defeat of the Spainhower recommendations. Dr. Nystrand testified that the defeat of the Spainhower recommendations resulted from a desire to maintain local control and from racial concerns. (Tr. 6095). While there has been considerable evidence to support the Doctor's conclusion regarding local control, the plaintiffs did not present facts to support the conclusion that racial opposition caused the recommendation's defeat. Allegations that some legislators may have made private comments about race, (Spainhower Depo. at 30), even if accepted as true, were not a significant factor contributing to the recommendation's demise. (Spainhower Depo. at

30-37). Nor is plaintiffs' position bolstered by evidence that private individuals opposed the Spainhower recommendations. The vast majority of opposition by private individuals was motivated by concerns that the patrons' sense of participation would be negated and that local control would be diminished. These concerns were altogether unrelated to race. (Tr. 6967, P. Ex. 497). Moreover, private racially-motivated opposition is factually irrelevant. No defendant or governmental entity adopted these purported racial motivations or was prompted to act or to refrain from acting because of them. Nor does private opposition constitute "state action" under the Fourteenth Amendment; therefore such opposition is also legally irrelevant. *See, United Brotherhood of Carpenters, Local 10* v. *Scott,* 103 S.Ct. 3352, 3357 (1983).

The plaintiffs have offered evidence that various school district defendants expressed opposition to the Spainhower recommendations. The evidence shows that the defendant districts which opposed the recommendations opposed them because they desired to maintain the control and authority over educational matters exerted by the local boards of education. (P. Ex. 1728). Also, the districts had great pride and a sense of community in the school districts which they had built. The recommendations proposed to destroy or alter those districts in a fundamental fashion. (Spainhower Depo. at 35). There were simply myriad reasons for opposition to these recommendations that had no discriminatory basis.

Additionally, the variety of proposals to restructure school districts in the metropolitan area drew both support and opposition. Some of those proposals, such as Dr. Hazlett's article in "Conceptions for Changing Times," suggested a metropolitan school district which did not include all of these defendant districts.

The "Milwaukee Plan" which essentially pays incentives for black students to attend school in other districts

also failed in the state legislature. The Missouri Department of Education concluded that the bill as introduced was too expensive for the state.

There is no evidence that any of the SSDs rejected or declined to consider these proposals for reasons at all related to race. Plaintiffs failed to adduce any evidence of racial intent by any of these suburban school district defendants. *Cf. Bradley v. School Board,* 338 F.Supp. at 158 (opposition to merger suggestions) *rev*'d, 462 F.2d 1058, (4th Cir. 1972), *aff'd mem.*, 412 U.S. 12 (1973). And absent a duty to merge, arguing failure to do so is legally irrelevant.

Employment Practices

In an intradistrict setting, courts often consider faculty composition as one indicator of a segregated school system. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). Plaintiffs argue in this interdistrict context, however, that faculty imbalance between the SSDs and the KCMSD is a vestige of the prior dual school system and that the lack of black teachers in the suburbs discourages blacks from moving to these areas and thereby affects the racial composition of the student body. The Court rejects plaintiffs' arguments for two reasons: first, the evidence does not support plaintiffs' conclusions that there has been discriminatory hiring by the SSDs; and second, there is no credible evidence that a link exists between faculty composition and student body composition.

Because this is not a Title VII employment discrimination suit of an intradistrict nature, plaintiffs had to draw a link between employment practices by the SSDs and the racial composition of its student body thereby implying an interdistrict effect. Plaintiffs' evidence, however, fails to provide that link.

Plaintiffs rely primarily on the testimony of their statistician, Dr. Robert Carlson. Essentially, Dr. Carlson's

analysis shows that between 1973 and 1980, ten percent of the teachers available for hire in the metropolitan area were black yet few of the SSDs hired that percentage of minority teachers. The conclusion drawn is that employment decisions (and ensuing racial composition of the faculty) was not a chance occurrence. (Tr. 6448, 6529). While the analysis may eliminate chance as a reason for the number of black hires, it does not provide a basis for plaintiffs' further conclusion that racial animus motivated the districts' employment decisions and that in turn led to an imbalanced student body.

For the following reasons, the Court finds Dr. Carlson's methodology unsound and his conclusions therefrom unpersuasive: first, the analysis *assumes* each district received 10% minority applications; there was *no* evidence of the actual number of applications submitted to each defendant district from which faculty was hired. (Tr. 6506). Second, the analysis did not consider if black applicants turned down job offers (Tr. 6515) or whether there was a personal preference by black teachers to teach children of a particular race. (Tr. 6483). Instead, Dr. Carlson assumed all black applicants would be willing to work in the SSDs. (Tr. 6502). Third, Dr. Carlson did not consider if the KCMSD, or another district, such as Kanasas City, Kansas was hiring an inordinately large number of black teachers from the available labor pool, and if so why. (Tr. 6503-04, P. Ex. 721F, Table C). Nor did Dr. Carlson consider disparities in starting salaries among the defendant districts and the KCMSD. (Tr. 6475). Fourth, in determining the number of expected black hires, Dr. Carlson considered both full-time and part-time teachers. In calculating the number of blacks actually hired, Dr. Carlson only used full-time teachers and disregarded part-timers. (Tr. 6473-74) Fifth, Dr. Carlson did not consider the labor pool members' qualifications to teach particular subjects nor match those qualifications to the needs of each defendant district. Dr. Carlson did not compare the needs of each district, did not compare the curriculum of each district, and did

not consider whether the labor pool members were certified to teach in Missouri or Kansas. (Tr. 6469-6476). In fact, Dr. Carlson's opinion was based upon the unproven assumption that black and white teacher applicants had equal training, qualifications, and experience. (Tr. 6485).

Plaintiffs' conclusion that black faculty would attract more blacks to the suburbs was supported primarily by the opinion of Dr. Orfield. His opinion, however, was not based on any reliable study or analysis actually done. (Tr. 15,304, 15,415). In fact, the study upon which Dr. Orfield purportedly relied merely referred to "some" black teachers or staff being present in the district. (Tr. 15,299). And, gauged by that standard, every suburban district qualifies. Moreover, the Court notes that plaintiffs' witness, Dr. Fields, contradicted Dr. Orfield's opinion by concluding that more black teachers in the SSDs would make little if any difference in the number of black students in the districts. (Tr. 2115).

Raytown and Grandview each have more black students than North Kansas City School District, although North Kansas City School District has appreciably more black teachers than either of those districts. (P. Ex. 2967). The evidence in this case, therefore, refutes plaintiffs' conclusions.

The Court finds it would be speculative to conclude there would be more black students residing in the defendant districts if those districts had more black teachers and staff. In any event, plaintiffs have no constitutional right to attend school in a school district with a teaching staff of any particular racial composition. *Oliver* v. *Kalamazoo Board of Education*, 706 F.2d 757, 762 (6th Cir. 1983). As the Sixth Circuit declared, "[A]ll that the students are entitled to is the 'sustained good faith effort to recruit minority faculty members so as to remedy the effects of any past discriminatory practice.' (citations

omitted)." *Id.* at 762 (footnote omitted). The Court notes that the school district in *Oliver* had already been found guilty of discriminatory hiring practices. Certainly, a student's rights in districts not found guilty of constitutional violations (like here) would not be greater.

III. Effects

A portion of plaintiffs' "effect" theory suggests that the SSDs may be included in an interdistrict remedy even absent any finding that they have committed specific constitutional violations. Plaintiffs had to resort to arguing "effect" because they presented no evidence that any of the SSDs acted to cause segregation.

One aspect of this theory, white flight, does not implicate any SSD and must be rejected. There is no evidence that any school official of the SSDs acted to lure white families or to discourage black families from moving into their districts. In fact, the Court finds that none of the factual evidence concerning housing implicated any of the school district defendants. Several of plaintiffs' witnesses, Edward Fields, Lucille Bluford and Cleo Miller, testified to having had substantial contact with the SSDs yet none of these witnesses knew of any action by the SSDs which lured white families into those districts. (Tr. 2116, 3127 and 6964).

In fact, as indicated at the outset, none of plaintiffs' witnesses, expert or otherwise, could attribute any change in the housing market to an action by any SSD. A review of some of that testimony confirms this fact.

Plaintiffs called Dr. Gary Orfield as an expert in both school and housing areas. The Court finds that Dr. Orfield's testimony concerning racial transition within the KCMSD has only intradistrict implications. There was nothing in Dr. Orfield's testimony that would constitute credible evidence that any SSD caused or contributed to cause white flight from the KCMSD. (P. Ex. 1778A-G

demonstrates no significant white flight effects in any of the suburban districts). Moreover, Dr. Orfield noted that no ethnic group is racially balanced residentially and no one in this field of study apparently advocates a random dispersal of ethnic groups. (Tr. 15,410).

The Court also finds that many of the moves of blacks into the suburbs are accounted for by the desire to live in middle class situations and not necessarily a desire to live in an integrated situation. (Tr. 15,408-10).

Plaintiffs also called Dr. John Kain in connection with their housing case. The import of the Kain analysis was an attempt to portray what the population distribution would be in the Kansas City metropolitan area if all residential location decisions had been made solely on the basis of three factors, family income, family structure, and the presence of children. Dr. Kain attempted to discount the significance of other factors which influence a family's decision on where to live. (Tr. 7473-76). Dr. Kain's decision to use only three variables in his analysis was assertedly based on his knowledge of research in the field of the factors influencing residential choice. (Tr. 7489). Dr. Kain readily admitted, however, throughout his testimony that many other factors bear on a family's decision of where to reside.

Even accepting Dr. Kain's conclusion that the present racial segregation is due to discrimination, Dr. Kain offered no evidence or opinions tending to show that any actions or inactions of any SSD contributed in any significant way to causing the racial residential separation he described. The Court finds that none of the SSDs did or failed to do anything which had any significant effect on residential patterns in the Kansas City SMSA. His testimony, therefore, does not support plaintiffs' claims for relief against the SSDs.

Another of plaintiffs' expert witnesses was Yale Rabin, a professor of architecture and urban planning at the University of Virginia. (P. Ex. 2871). Although the

thrust of Mr. Rabin's testimony was that blacks have been confined within the KCMSD, absolutely no credible evidence pointed to actions by any of the SSDs causing this condition to exist. The Court finds that blacks are not constrained within the KCMSD by any action of the SSDs. Indeed, as discussed *infra*, P. Ex. 53G and other evidence shows that the black enrollments in each of the defendant school districts have increased fairly steadily since 1968. In 1980, 23,434 blacks resided outside of what Mr. Rabin called the "principal contiguous area" on P. Ex. 12A. (Tr. 11,071-72). This was an increase from 1970 of 14,645 blacks. (Tr. 11,074). Mr. Rabin made no attempt to develop the data at the school district level (Tr 11,080-81), although he could have done so through Dr. Kain's method (P. Ex. 1265H), or roughly by use of township level data. (Tr. 11,083). In any event, the Court finds that this fact refutes Mr. Rabin's barrier theory to black movement. The Court finds that nothing in Mr. Rabin's testimony tended to establish any facts for which there would be any liability on the part of any SSD.

In regard to Mr. Rabin's testimony concerning relocation matters, the Court finds that the relocations had no significant effect on the racial composition of the enrollment in any SSD. The Court also finds that any racial discrimination resulting from the placement of highways and urban renewal projects are matters with which no school district had any influence, input or control.

Another of plaintiffs' housing experts was Professor Gary Tobin. The Court has considered carefully Dr. Tobin's presentation, and finds that none of the SSDs were shown by Dr. Tobin to have had any significant involvement in housing matters, or any control whatsoever over the private decisions people make as to where to live. The Court also finds that none of Dr. Tobin's opinions demonstrated any significant effect on the racial makeup of any of the SSDs. Dr. Tobin described the growth of the white population in suburban areas between

1950 and 1970, although he, like Professor Rabin, made no attempt to study the growth in any individual school district. He stated that the white population grew by over 224,000 while the population in the City of Kansas City (which includes many areas covered by the SSDs) declined by 72,000. (Tr. 12,982-83, 13,313-15 and P. Ex. 16G). He made no analysis as to the cause of that demographic shift, and there is no evidence that any of the SSDs took any action to lure whites out of the city. The SSDs had no involvement in or influence on the manner in which blacks or whites made residential decisions. Actions of the KCMSD in assigning children to particular schools may have had an intradistrict effect but those actions were not influenced by any SSD. Nor did those actions have any significant effect on the enrollment of any other SSD.

Part of plaintiffs' evidence of white flight to the suburbs consists of charts displaying the transfer of student records from various KCMSD high schools to surrounding districts over a 15-year period from 1958 to 1973. (P. Ex. 1775B, C, D, E). The following totals reflect the number of records transferred to each SSD and the percentage of total student enrollment that number represents:

SCHOOL DISTRICT	Total Number Transferred	Percentage of KCMSD Enrollment	Percentage of SSD Enrollment
Blue Springs	24	.04	.5
Center	225	.3	4.1
Ft. Osage	9	.01	.2
Grandview	82	.1	1.2
Hickman Mills	350	.5	2.5
Independence	121	.2	.8
Lee's Summit	66	.1	1.1
Liberty	9	.01	.2
North Kansas City	120	.2	.5
Park Hill	25	.04	.4
Raytown	346	.5	2.3

(P. Ex. 1775B, C, D, E, 53G).

Even assuming all students were white (the records contained no race designations) and further assuming they all moved to the SSDs because of racial transition in the KCMSD schools, plaintiffs' argument still fails. First, there is no evidence that the SSDs enticed these families to move to their districts. And second, regardless of the impetus behind the moves, the numbers involved are too insignificant to have had a segregative impact on the KCMSD or the SSD. White flight is simply not a constitutional violation by any SSD.

In describing the Southeast Corridor, (the direction of extension of the black population from its core), Dr. Tobin stated that by 1980 it had extended into the Raytown, Hickman Mills, Center and Grandview School Districts. (Tr. 12,978-79). Thus, the Court finds that school district boundaries have not constrained black movement in any way. (Tr. 13,367).

Dr. Tobin also testified extensively regarding racially restrictive covenants that were utilized and enforced until 1948. (Tr. 13,005, 13,012-14). There was no evidence such covenants were enforced by the state courts following *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). Nor was there any evidence that any SSD was involved in the placement or enforcement of any racially restrictive covenant. (Tr. 13,359). Additionally, tremendous housing growth in many suburban areas occurred after 1948 when such covenants were a nullity. The fact that blacks presently live in locations previously covered by restrictive covenants further undermines their significance.

Dr. Tobin also testified regarding FHA practices and their effect on the housing industry. (Tr. 13,081). These practices, however, are totally beyond the control of any particular school district. No connection was made between actions by FHA or other government officials and any SSD official.

Dr. Tobin's other area of analysis concerned the location of public and subsidized housing. He made no

analysis, however, of the number of public and subsidized units compared to the total number of units in each suburban district, (Tr. 13,348), or compared to the total population in each district. (Tr. 13,349). Thus, there is no precise way to determine whether the KCMSD has a disproportionate share.

Plaintiffs' Ex. 27 purports to list all public and subsidized housing, and it shows that such housing is available in significant amounts in every defendant school district. The HUD § 8 program is also available in all parts of the metropolitan area. Although Dr. Tobin at first disputed the observations of former HUD director Southerland that there were thousands of lower income units in suburban areas (Tr. 13,350), he later agreed with that fact. (Tr. 13,429-30). Essentially, Dr. Tobin argued that there would be even more blacks living in low cost housing in suburban areas if there were more affirmative marketing and counseling. (Tr. 13,239-40). Nevertheless, these matters are totally beyond the control of any school district. Furthermore, such an opinion overlooks Parvin Estates, a § 236 subsidized project in the NKC district, where Mrs. Ruth Schecter, one of the project's organizers, engaged in extensive marketing efforts with little success. (Tr. 12,542-43, 12,581-82, 12,584). Despite the affirmative marketing efforts advocated by Dr. Tobin, Parvin Estates has only been able to attract a 7 to 12% minority. Dr. Tobin had not considered those matters in giving his opinions. (Tr. 13,273-74).

Mrs. Schecter stated her expert opinion that a dual housing market existed and that to some extent it continues. (Tr. 12,339). The programs and practices she described, however, involved private real estate brokers (Tr. 12,339-40), and speculators (Tr. 12,377). She also blamed various HUD programs such as FHA (Tr. 12,369, 12,376), § 235 (Tr. 12,371) and subsidized housing (Tr. 12,382, 12,386), as well as highways and urban renewal; none of her opinions were based on actions by any particular SSD.

Another expert witness on the housing matter was journalist Charles Hammer. Most of Mr. Hammer's testimony concerned actions within the KCMSD; he did not identify any SSD as having any connection whatsoever with racial turnover in southeast Kansas City neighborhoods. He attributed fault to real estate brokers (Tr. 12,008), urban renewal, highways, and FHA. (Tr. 12,025, 12,040 and 12,044-45).

To the extent, if any, that the racial composition of the KCSMD is the result of steering and blockbusting practices by private real estate agents, both black and white, (Tr. 1930-33, 3103-04), the Court finds that these actions of private individual real estate agents are not actions of the KCSMD or of any SSD, and are beyond the control of any school district. (Tr. 1927-28). The Court finds that the SSDs played no role in initiating, sanctioning, or perpetuating blockbusting, steering or red lining activities. (Tr. 1927-31, 1935). Ms. Lucille Bluford, the editor of the black newspaper, *Kansas City Call,* noted that the transition of neighborhoods from white to black and accompanying white flight had existed in Kansas City since the 1940's (Tr. 3001, 3004) yet there was no testimony that linked the SSDs with this process. The Court finds that people moved for a variety of reasons, including a desire to be with people of like religious and racial characteristics. (Tr. 2034-35). There was no testimony that the SSDs contributed to those private preferences and decisions. (Tr. 3125).

A substantial number of black families have moved into the SSDs during and after the 1960's. (Tr. 439, 667, 1559-60, 1702-03, 1724, 2062, 2103, 2351, 3125-26, 4869-71, 6810, 7095 and 7097). Many of these black families moved into those districts from locations inside the KCMSD. (Tr. 439, 6810, 6968).

With the exception of Liberty, the percentage of black students in each of the SSDs has increased since 1968 and, as the following chart displays, the increase has sometimes been dramatic:

SCHOOL DISTRICT	Percentage of Black Students 1968	Percentage of Black Students 1982	Percentage of Student Enrollment 1968	Percentage of Student Enrollment 1982
Blue Springs	0	162	0	1.9
Center	3	327	.1	10.6
Ft. Osage	2	25	0	.4
Grandview	32	494	.6	9.8
Hickman Mills	29	1,497	.2	16.7
Independence	141	140	.9	1.2
Lee's Summit	1	N/A	0	N/A
Liberty	124	101	3.4	2.7
North Kansas City	0	153	0	1.0
Park Hill	23	N/A	.4	N/A
Raytown	0	673	0	7.6

(P. Ex. 53G).

Although the percentage of black students in Liberty declined slightly from 1968 to 1982, that decline cannot be attributed to massive white flight to Liberty. In fact the raw numbers show that Liberty only had 28 more white students in 1982 than it did in 1968, an increase of only .79% over fourteen years. (P. Ex. 53G).

Based on the evidence presented, the Court is compelled to find that no SSD in any significant way influenced the housing patterns in the Kansas City metropolitan area. And, as discussed *supra*, the Court rejects plaintiffs' "effects" theory that liability may be placed upon the SSDs for being the recipients of people moving for whatever reason. Absent a nexus between conduct of the defendant SSDs and the housing actors, the Court will not find the SSDs liable for racial imbalance that may be attributed to policies or practices of independent housing actors. *Bell* v. *Board of Education*, 683 F.2d 963 (6th Cir. 1982).

FINDINGS APPLICABLE TO INDIVIDUAL DISTRICTS

Blue Springs

No evidence of racial motivation was presented regarding the formation of the district which, by popular vote of eleven rural districts in 1949, became the Blue Springs Reorganized School District No. 4. (P. Ex. 255, 525).

Plaintiffs have adduced no evidence that the boundaries of the defendant district were discriminatorily drawn. The Board of Education did pass a resolution dated July 25, 1975 that opposed any measure that would change, divide or enlarge its existing boundaries. (P. Ex. 2125). Although KCMSD is mentioned in the resolution, the Court finds this was only a vote for local control; there is no evidence of discriminatory purpose or impact. In any event, the resolution had no effect; the people could have ignored it and petitioned and voted for a change in boundaries.

There were some black families living in the small rural districts which were later reorganized to form the defendant district. All were farmers (Tr. 883, 914, 935, 951-52, 964, 5308), and the closest school for blacks was the Young School in Independence. The enumeration data shows only five black children located in the small rural districts between 1911 and 1943. Even assuming these children were transferred to Independence or Kansas City for school, the Court finds there is insufficient evidence that the transfers had other than a *de minimis* impact on any other school district. All the black families were gone by 1943.

In 1971, the Blue Springs District joined the Cooperating School Districts Association of Suburban Kansas City to increase buying power, influence legislation, and share new education ideas (P. Ex. 1700, Bartow Depo. Vol. II at 46). The Court concludes that Blue Springs' partici-

pation in this organization did not discriminate against the KCMSD or its students.

Blue Springs participates in the Ft. Osage AVTS as do the Grain Valley and Oak Grove Districts (not defendants herein). (P. Ex. 34 and 1709). The Court finds no racially discriminatory intent accompanied the founding of the Ft. Osage AVTS nor Blue Springs' participation therein. (*See also* individual section regarding Ft. Osage, *infra*).

The only other interdistrict student involvement relating to Blue Springs is the operation of a Blind-Deaf Center that educates children from both Blue Springs and other districts. (P. Ex. 1720). Non-resident transfers to the Center are accepted on a space-available basis. (P. Ex. 1720). There is no evidence of any discriminatory intent nor effect on any of the defendant districts by the operation or participation in the Blind-Deaf Center.

Such matters as the ½% sales tax and House Bill 171 are irrelevant to Blue Springs because the district is not within the city limits of Kansas City. (Tr. 6204, P. Ex. 1767 and 1999). Nor is it contiguous to the KCMSD. (P. Ex. 37).

While there are few black faculty or staff employed in the defendant district, there is no evidence that the teachers are hired on other than their qualifications. (P. Ex. 982 and 2967). As more fully set forth in the general findings *supra,* interdistrict employment discrimination, even if found to exist, has little if any bearing on the racial composition of defendant districts and therefore has little relevance to this litigation.

There is no evidence that the Blue Springs School District acted to prevent blacks from obtaining housing in the district with an intent to discriminate. Even if Dr. Tobin's map depicting restrictive covenants in Blue Springs is found to be accurate, (P. Ex. 22), they had no effect because most of the residential development in the area

occurred after the Supreme Court's decision in *Shelley* v. *Kraemer,* 334 U.S. 1 (1948).

Having failed to establish any intentional racially discriminatory act or omission by these defendants which has had a substantial segregative impact in any other school district, the Court will sustain the Rule 41(b) motion filed by Blue Springs and its superintendent.

Center

The present Center School District consists of territory formerly occupied by the Center, Dallas and Boone districts. Dallas and Boone were grade school districts and sent their high school students to Center when space was available. (Lehman Depo. at 16). The present boundaries and the annexations that occurred were not racially motivated. (*See,* e.g., P. Ex. 405). The district is situated south and is continguous to the KCMSD. (P. Ex. 37). Center did support passage of Senate Bill 29 in 1963 which changed the law so that annexation elections would be more difficult to call but their position was prompted by the fact that eight elections had been called from the late 1940's until the early 1960's to annex Center to the KCMSD. Each election, held at the district's expense, had failed by a large margin. (Bondurant Depo. at 13, 74, 49). The Court finds the position taken by Center was not racially motivated and had no segregative effect.

There is no evidence that Center had any black residents at any time prior to 1954. (Lehman Depo. at 83). The records do show the following number of high school students residing in areas now encompassed by Center attended the KCMSD for the years indicated: 1949-50, 37; 1950-51, 38; 1951-52, 39; 1952-53, 42; 1953-54, 77; 1954-55, 116. (P. Ex. 1770). Even if the Court were to assume all these children were black, they are of insufficient number for the Court to conclude they had a substantial segregative effect on either district. The Court therefore determines that for space reasons or other rea-

sons not apparent from the evidence, some Center students attended the KCMSD; none of the transfers, however, were racially motivated. (Lehman Depo. at 29). There is no evidence that Center at any time failed to permit black children residing in the district to attend its schools, treated black children attending Center schools differently because of race, assigned students on other than a racially neutral basis, denied admission to any black student on the basis of race, or in any other way conducted itself in a racially discriminatory manner. Center never operated a dual school system and, therefore, no vestiges remain to dismantle.

Over the past decade, Center's minority population has grown significantly. Presently, over 12% of the student population is black. (P. Exs. 53G, 983, and 2967). This growth substantiates the Court's findings there are no unconstitutional barriers to black residents or students in the Center District.

As explained in the general findings, the Cooperating School Districts Association of Suburban Kansas City, of which Center is a member, was not formed and does not operate with a racially discriminatory purpose. (Tr. at 4832). The organization has had no racially segregative effect in any district.

Because the district is presently located within the Kansas City city limits, (P. Ex. 425), it chose to support and share in the ½% city tax. (P. Ex. 2177). As discussed regarding all districts *supra*, Center's cooperation with the City in this manner was in no way racially motivated.

Because of a lack of facilities in the district, Center sends its handicapped and other special education students outside the district, often to the KCMSD. (Lehman Depo. at 61). These transfers are made for sound educational reasons, are racially neutral, and are insignificant in number.

Center participates in the Herndon AVTS located in the Raytown School District. There is no evidence that

Center refused to participate in the KCMSD's vocational technical school or that the KCMSD ever offered the opportunity to participate.

Support of H.B. 171 and opposition to the Spainhower plan were for reasons of local autonomy. (Lehman Depo. at 77-79). There is no evidence whatsover that Center's position on either issue was racially motivated.

Center employed its first black teachers in 1978. (P. Ex. 984). There is no evidence that Center has ever discriminated against any applicant for employment on the basis of race. Nor is there any evidence that any black applicant for employment in Center has ever been refused employment. The only evidence regarding Center's employment practices are the statistics from plaintiff's statistician, Dr. Roger Carlson. And, as discussed at length *supra*, his statistics and opinions are based on the availability of teachers in the entire SMSA rather than on the number of applicants to each defendant district. The Court therefore finds his opinions unpersuasive. Further, as more fully explained in the general order, there is insufficient evidence that the racial makeup of Center's staff has in any way influenced housing choices of either race. The Court finds that Center's hiring practices have had no effect whatsoever on the racial composition of the student body of Center or that of the KCMSD.

In regard to housing, the Court finds there is no credible evidence that Center School District took any action or position which prevented any black family from moving to the district. Nor is there any credible evidence that Center took any action or postion which enticed or lured any white family from the KCMSD to Center. The map prepared by Dr. Tobin, plaintiffs' expert, (P. Ex. 22), shows that there were racially restrictive covenants in the Center School District, but there is no evidence which tends to prove that Center had any complicity in the placement or enforcement of those covenants nor is there any evidence that any black family failed to move to Center because

of those covenants. The continued increase in the number of blacks enrolled in Center (*see, e.g.*, P. Ex. 53G, and 983), is convincing evidence that there is no barrier to blacks moving to the Center District nor is there any present effect of any past practices which may have had a discouraging effect on black moves.

Having failed to establish any intentional racially discriminatory act or omission by these defendants which has had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by Center and its superintendent.

Fort Osage

The Ft. Osage Reorganized School District R-1 was created in 1949 by a popular vote of the people residing in the area. (P. Ex. 538). The proposed reorganized district included the former Buckner and Levasy High School Districts and sixteen other rural districts. In 1951, three more rural school districts annexed to Ft. Osage, (Gragg Depo. Ex. F032), and in 1972, the Courtney School District voted to annex to Ft. Osage. (Gragg Depo. at 61-62). The Court finds the reorganization and annexations were not racially motivated. Ft. Osage is not contiguous to the KCMSD. (P. Ex. 37).

There was some evidence that a small number of black families lived around Sibley, now part of the Ft. Osage district, well before 1954. There is no evidence that Ft. Osage or any of its predecessor districts educated its black students in separate schools. Instead, the predecessor districts transferred those two or three black students to the KCMSD. (Tr. 5960). These few transfers did not have any segregative effect on any district. If any blacks left Ft. Osage or its predecessor districts, or failed to move to such areas from 1910 to 1954 because no black school was maintained, plaintiffs have failed to prove their numbers were other than *de minimis*. (Tr. 5960).

By 1954 there were no blacks living in the Ft. Osage School District. In 1968, two blacks had enrolled in the school district; by 1982, there were 25 blacks enrolled. (P. Ex. 53G). All students, regardless of race, attended the one high school located in the district. (P. Ex. 2967). There is no evidence of discrimination against any blacks attending the Ft. Osage schools. (Gragg Depo. 220-222).

At one time, Ft. Osage's orthopedically handicapped students attended the Delano School in the KCMSD because Ft. Osage had too few students with such handicaps to provide adequate teaching facilities within the district. (Gragg Depo. at 134-35). Presently, these children attend school at the Independence Comprehensive Special Education Program, (Gragg Depo. at 136), which is much closer than the Delano School. Ft. Osage's blind students attend the Blind-Deaf Center in Blue Springs school rather than the Troost School in the KCMSD, again because it is considerably closer to the students' homes. (Gragg Depo. at 137). The Court finds that these educational transfers did not have any effect on the racial composition of Ft. Osage or any other school district. Nor are they racially motivated or administered.

The Ft. Osage AVTS opened in 1968 accepting students from the Ft. Osage, Blue Springs, Grain Valley and Oak Grove School Districts. (Bartow Depo. at 94). The Grain Valley and Oak Grove districts are not parties to this case and none of the participants is contiguous to KCMSD. (P. Ex. 1709, Gragg Depo. Vol. 2 at 43). Ft. Osage decided to build the AVTS within its district because it had unused bonding capacity. (Bartow Depo. at 101). As discussed in the general findings, Ft. Osage did not join with the KCMSD AVTS because it was too far away. (Tr. 6215). No school district other than those currently participating in the Ft. Osage AVTS, including the KCMSD, ever asked to participate in the Ft. Osage AVTS. (Bartow Depo. at 100, Gragg Depo. at 93-94 and Vol. II 2 at 96). The Court finds that the formation and operation of the Ft. Osage AVTS does not constitute

a violation much less a significant interdistrict violation. Nor does state funding of the Ft. Osage AVTS unfairly impact on the funding of the KCSMD AVTS. (Tr. 6407-08).

Notwithstanding its affirmative action policy statement, the district has yet to employ a black teacher or staff person. (P. Ex. 2967). In recent years, Ft. Osage has entered into written contracts with black teaching candidates but, on each occasion, the candidates have decided to pursue other alternatives. (P. Ex. 2967 and Gragg Depo. at 225). Plaintiffs' evidence of employment practices, based entirely upon Dr. Carlson's analyses, did not consider this fact. (Tr. 6514). Moreover, as set forth more fully in the general findings, there is simply no credible evidence that the presence of more black teachers or administrators in Ft. Osage would have had any significant impact upon the racial composition of the students enrolled there.

Plaintiffs did not present proof that the Ft. Osage School District acted to prevent blacks from obtaining housing in the district nor in any way encouraged whites to do so. The map of restrictive covenants prepared by plaintiffs' expert, Dr. Tobin, located no such covenants in the Ft. Osage School District. (P. Ex. 22). There is no evidence that Ft. Osage ever opposed subsidized or other low cost housing of any kind in its district, and the Court finds such public and subsidized housing presently exists. (P. Ex. 27). The district's only involvement in zoning plans was its opposition to a planned liquor store near the Ft. Osage High School, (Gragg Depo. at 54-56, 58), and was not racially motivated.

The Court finds that Ft. Osage did not take a position on the Spainhower report. (Bartow Depo. at 152). Additionally, because none of the Ft. Osage School District lies within the limits of the city of Kansas City, House Bill 171 and the ½% sales tax have no relevance to this defendant.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by the Ft. Osage School District and its Superintendent.

Grandview

Plaintiffs' expert, Dr. James Anderson, established that no black persons resided in Grandview prior to 1954. (Tr. 5959, P. Ex. 37A). Therefore, Grandview never transferred any black students to the KCMSD. The Court finds that Grandview has never operated a dual school system and accordingly there are no vestiges to dismantle. The district is situated to the south but not contiguous to the KCMSD. (P. Ex. 37).

Currently the school district has a black enrollment of 10.1%. (P. Ex. 2967). Plaintiffs' expert, Dr. John Kain, predicted virtually the same proportion of black students would be expected in the school district in the absence of alleged discrimination (Tr. 8066). These figures confirm that, contrary to plaintiffs' arguments, there are no barriers preventing blacks and other minorities from moving to Grandview. All students, regardless of their race, meeting the established and racially-neutral residency requirements of the Grandview School District, have always attended school in that district.

Over the years, handicapped children or other students with special educational needs have attended special schools in other districts, mainly the KCMSD, (Strode Depo. at 23, Staires Depo. at 27-28 and Harrison Depo. at 91), because Grandview did not have adequate facilities to provide for them (Strode Depo. at 35). These transfers were for the sole purpose of accommodating the needs of its handicapped students (Staires Depo. at 27 and Strode Depo. at 23); there is no evidence of racial discrimination.

Grandview participates in the Herndon AVTS located in the Raytown School District. Grandview's participation in Herndon was administratively reasonable and proper and was not racially motivated: Herndon is located much closer to Grandview High School than is the KCMSD vocational education facility. Grandview is adjacent to the Raytown School District, but does not border on the KCMSD. Further, there was no evidence to show that the KCMSD invited or suggested to Grandview that it participate in the KCMSD's existing vocational program.

Grandview's opposition to the Spainhower recommendations was not related to race or any alleged potential for consolidation with the KCMSD (Strode Depo. at 16, Staires Depo. at 46 and Harrison Depo. at 115). Grandview opposed some of the Spainhower recommendations because it believed them to threaten local board autonomy (Staires Depo. at 46, Strode Depo. at 75 and P. Ex. 3240).

The only evidence offered by the plaintiffs to support their allegation that Grandview discriminated in hiring came from the plaintiffs' expert witness, Dr. Roger Carlson. In addition to the other flaws in his analysis, Dr. Carlson's data was inaccurate as applied to Grandview. For example, Dr. Carlson reported that Grandview hired three black teachers between 1973 and 1980 (P. Ex. 721F, Table G), yet plaintiffs' other evidence shows that Grandview hired five black teachers during that period. (P. Ex. 988 and 2967, Harrison Depo. at 76). Notwithstanding the variation, the racial composition of the faculty and staff of Grandview has not affected the racial composition of the students attending Grandview. (See general findings *supra*).

Plaintiffs did not present proof that the Grandview School District acted to prevent blacks from obtaining housing in the district with an intent to discriminate. The map of restrictive covenants prepared by plaintiffs'

expert, Dr. Tobin, located very few such covenants in Grandview. (P. Ex. 22). Moreover, the Court notes most of the residential development in Grandview occurred after the Supreme Court, in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), eliminated the effect of such covenants.

There is no evidence that Grandview did anything to lure white students or to discourage black students from moving to Grandview. The school district studied residential development to assist in enrollment projections and was interested in housing and zoning matters because of their effect on the tax base. The district opposed the development of trailer parks because they are assessed as personalty for tax purposes. There is no evidence that any such action was intended to or had the effect of discouraging blacks from residing in the district.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by the Grandview district and its Superintendent.

Hickman Mills

The Hickman Mills School District was created as a result of a consolidation law passed in 1902. (Nesbit Depo. at 49). In the 1960's, there were two boundary disputes involving Hickman Mills: one with Center School District and one with the Grandview School District. In each case an election was held and the voters of Hickman Mills voted not to give up the land; the land involved in the Center dispute was granted to Center School District by a board of arbitration and the land involved in the Grandview dispute remained with Hickman Mills. (Nesbit Depo. at 57). Neither of the boundary disputes were racially motivated or had any racially discriminatory effect.

In 1964, an annexation election was held for the purpose of determining whether or not Hickman Mills should be annexed to the KCMSD and the proposal was defeated. (Tr. 4764-65, Wall Depo. Vol. I at 23). The Board of Education of Hickman Mills and its administrators adopted a neutral position on the issue. (Tr. 4765). Although race may have been an issue in the minds of some individual voters, (Tr. 4761-62), the primary reasons in favor of annexation to the KCMSD were financial ones, (Nesbit Depo. at 144-145), and the primary reasons against annexation concerned retention of local control of the schools. (Nesbit Depo. at 145). To the extent that race was an issue with some voters in the annexation election, the racial issue was not in any way caused by any action of the school district. The Court notes that at the time of the annexation election, the KCMSD was 65.2% white, (Def. Ex. K2), and the Hickman Mills district is not contiguous to the KCMSD. (P. Ex. 37).

Hickman Mills had no blacks living within its boundaries at any time prior to 1954 or at any time between 1954 and the mid-1960's. (Tr. 4620, P. Ex. 1785, Wall Depo., Vol. I at 35, Nesbit Depo. at 19). Without black residents, there could not have been transfers of black school children to any other district nor the operation of dual schools for black and white children. Plaintiffs have failed to show the absence of a school for black children within Hickman Mills precluded any blacks from settling there. The Court finds Hickman Mills has always and continues to operate a unitary school system.

The black enrollment percentage of Hickman Mills School District has grown from less than 1% in 1968 to 18.02% in 1983. (P. Ex. 53G, 2967). The 18.02% black enrollment figure exceeds the 14.53% black population of the Missouri portion of the SMSA, and one of plaintiffs' experts, John Kain, stated that the Hickman Mills School District had reached the percentage black

enrollment he predicted would have occurred if there had been no race discrimination. (Tr. 8060, P. Ex. 53G, 1265P). Black occupancy has increased in every census tract within Hickman Mills in the past decade. (P. Ex. 1, 9, and 36). Every elementary school within Hickman Mills has steadily gained in the number of blacks enrolled over the period 1968 to 1982; in 1968, 13 blacks were enrolled in the elementary schools and by 1982 that number had increased to 757. (P. Ex. 1865A).

There were several post-1954 complaints regarding alleged disparate discipline of black and white students and a need for improved race relations. (Tr. 5126-27, 9629-30). The complaints occurred between 1967 and 1983, a time period within which the black enrollment of the district jumped from 29 to 1,571 students. (P. Ex. 53G, 2967). There was no evidence that these intradistrict complaints had any segregative effect within Hickman Mills or in any other defendant school district.

On October 27, 1979, the Office for Civil Rights, following a compliance review of the pupil assignment practices of Hickman Mills, notified the district it was not in compliance with Title VI of the Civil Rights Act of 1964. Eleven classes were found to have minority students in excess of OCR's acceptable range and required the reassignment of 1,268 black students in 1979-80. (P. Ex. 2444, 2967). One day later, Hickman Mills responded by letter that the pupils had been assigned randomly by computer and the district immediately agreed to make necessary adjustments to correct the imbalance. The OCR was justifiably satisfied and this intradistrict incident had no discriminatory effect on any other school district dedendant. (P. Ex. 53G, 2967).

The Cooperating School Districts Association of Suburban Kansas City, of which Hickman Mills is a member, (Wall Depo. Vol. I at 41-42), does not operate with a racially discriminatory purpose. Its main functions are

bulk buying power, a forum for discussing education issues, (Tr. 4832), and trying to influence legislation. As discussed in the general findings, there has been no evidence that any action taken by the organization has had an interdistrict segregative effect on any school district defendant.

Because a large portion of the district is within the Kansas City city limits, it chose to support and share in the ½% city tax. (P. Ex. 2177). As discussed in the general findings *supra,* cooperation with the city in this regard was not racially motivated.

Hickman Mills has cooperated with other defendant school districts, including the KCMSD, to provide for the education of its handicapped and special education students. (P. Ex. 1949, Wall Depo. Vol. II at 12-15). Records indicate the nonresident transfer of students in 1976 (race unknown) to special education/handicapped schools in the KCMSD, or to the Herndon AVTS. (P. Ex. 1949). The number of such transfers is *de minimis* and again has had no segregative effect on Hickman Mills, the KCMSD or any other school district defendant.

Hickman Mills established a program for partially sighted and hard of hearing students and receives children from Grandview, Raytown, Lee's Summit, Center and Belton (nondefendant). There is no hint these children are received on other than a racially neutral basis. (Nesbit Depo. at 204-05).

Hickman Mills participates in the Herndon AVTS in the Raytown School District. (Nesbit Depo. at 169). The KCMSD did not invite nor suggest to Hickman Mills that it could participate in KCMSD's area vocational school. (Nesbit Depo. at 169). Hickman Mills' involvement in the Herndon AVTS has had no interdistrict segregative effect on any defendant school district in this case.

Hickman Mills opposed the Spainhower report because it, like other districts, feared the plan would result in a loss of local control of schools. (Nesbit Depo. at

173 and 178). There is absolutely no evidence that Hickman Mills' opposition to the plan had any effect on the racial composition of any school district defendant.

In regard to faculty, there is no evidence that Hickman Mills failed to hire any qualified black teacher who applied for a job with the district. Outside of the testimony of Ms. Betty Sapp, discussed *infra,* plaintiffs relied on the statistical calculations and conclusions of Dr. Roger Carlson. There is a variance between the number of black teachers hired by the school district as reported and analyzed by Dr. Carlson (P. Ex. 721F, reporting 8) and plaintiffs' other evidence: the EEO-5 forms for 1977 and 1978 (P. Ex. 990, reporting 9), and defendant's answers to interrogatories for the years 1977 through 1979 (P. Ex. 2967, reporting 11). Regardless of the number selected, the Court finds no correlation in Hickman Mills between the number of black teachers and the number of black students enrolled in the district. As more fully set forth in the general findings, employment practices and composition have no bearing on the racial composition of the student body and therefore no relevance to this litigation.

Ms. Betty Sapp, a former black teacher with Hickman Mills School District, alleged there were unfair disciplinary and class assignment practices regarding blacks at one junior high school. Ms. Sapp had also filed an employment discrimination charge against the district which was settled without litigation. Ms. Sapp's testimony that three black teachers besides herself were not rehired in 1979 (Tr. 8792) is contrary to the weight of the evidence. (P. Ex. 990, 2967). Even without questioning the witness' veracity, her allegations of discrimination are of an intradistrict nature, having no relevance to the issue of interdistrict liability.

There is no evidence that the Hickman Mills School District caused or contributed to cause housing discrimination within its boundaries. The map prepared by Dr. Tobin (P. Ex. 22), shows there were restrictive covenants

in the Hickman Mills School District, but there is no evidence which tends to prove that the school district had any complicity in the placement or enforcement of those covenants. Nor is there any evidence that any black family failed to move to Hickman Mills because of those covenants. The continued and substantial increases in the number of blacks enrolled in Hickman Mills (*see, e.g.,* P. Ex. 53G, Ex. 990), is convincing evidence that there is no barrier to blacks moving to the Hickman Mills School District nor is there any present effect of any past practices which may have had a discouraging effect on black moves. (Tr. 13,368-69).

Opposition by the Hickman Mills School Board to the rezoning of certain properties for trailer courts or apartment projects was premised on their belief that the tax revenues from such developments were insufficient to adequately support the per pupil expenditures for children from those developments. (Nesbit Depo. at 107, Wall Depo. Vol. II at 50-51). There is no evidence that any opposition was race related.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by Hickman Mills and its superintendent.

Independence

All of the Independence School District is situated in Jackson County, Missouri and includes the majority of the City of Independence, and a very small portion of the cities of Kansas City and Sugar Creek. (P. Ex. 37, 150). It lies directly east of the KCMSD and borders the Van Horn attendance area. (P. Ex. 36B). The Van Horn attendance area includes the former Rock Creek Elementary School District, the Sugar Creek Elementary School District and the Pitcher-Fairview Elementary School District. (Tr. 6120). Currently, the Van Horn attendance area is, with small exception, completely

within the limits of the City of Independence. (P. Ex. 36). The Sugar Creek District annexed to the KCMSD in 1955. The Rock Creek School District joined the KCMSD in 1957 and the Pitcher-Fairview District joined the KCMSD in 1958. (Tr. 6120, P. Ex. 407). All students in the Rock Creek, Pitcher-Fairview and Sugar Creek school districts were white. (Tr. 1976). Each of these districts has continuously remained a part of the KCMSD since annexing to it.

In 1971, a group of KCMSD patrons living in the Van Horn attendance area initiated a proposal to de-annex the Van Horn High School attendance area from the KCMSD and to annex it to Independence. (Tr. 1975-76, 6155-60). These KCMSD patrons obtained a sufficient number of signatures to call for an election in both districts. A number of reasons unrelated to race contributed to this proposal to change the boundaries. (Tr. 6156, Goodrich Depo. at 30). The voters in KCMSD defeated this proposition while the voters in Independence approved it. (Goodrich Depo. at 32). Because of the variance, the proposal was presented to a board of arbitration who decided not to approve it, thereby keeping the Van Horn attendance area in the KCMSD. (Goodrich Depo. at 32). The Court finds this boundary proposal was handled according to the requirements of the applicable and racially-neutral Missouri statutes. Whatever the intent of the patrons proposing the change may have been, there is no credible or persuasive evidence that the KCMSD, the Independence School District, the state or any other governmental official or entity acted with any racial animus. The Van Horn attendance area has continuously remained in the KCMSD. Even if this proposed change was racially motivated, there has been no effect on the boundaries or racial composition of the KCMSD, Independence, or any other school district. (Tr. 2054-55).

There have been no attempts or proposals to change Independence's boundaries since 1974. Considering all the evidence, the Court finds the Independence bound-

aries were formed and maintained for racially neutral reasons; the district has never annexed or failed to annex any territory for any reason related to race. The current boundaries are racially neutral and unitary in all respects.

There is a well-established stable black community in the Independence School District, primarily centered in the City of Independence. (Tr. 4570-71). Because of state-mandated segregated schools, black children, from 1866 until integration, attended the Douglass School (later renamed Young). (P. Ex. 39). The black school offered only elementary classes until it added ninth grade in 1920, tenth grade in 1934, and eleventh and twelfth grades in 1935. (P. Ex. 39). In 1945, the high school portion was closed and those students were transported to the KCMSD. Young continued to operate elementary classes for black children until 1957. (P. Ex. 39).

The followning chart indicates the number of blacks of school age enumerated and enrolled in Independence for the school years shown:

School Year	Enumerated	Enrolled Elementary	Enrolled High School	Enrolled Total
1930-31	235			153
1931-32	246	182	19	201
1932-33	238	174	12	186
1933-34	242	168	18	186
1938-39	225	144	52	196
1939-40	219	127	56	183
1940-41	207	123	49	172
1941-42	258	104	51	155
1942-43	251	103	53	156
1943-44	248	85	42	127
1944-45	236	78	42	120
1945-46	226	75	*	75
1947-48	151	97		97
1948-49	161	108		108
1949-50	160	106		106
1950-51	157	104		104
1951-52	142	108		108
1952-53	151	110		110
1953-54	147	124		124

*** In 1945, the Young High School closed and students were transported to the KCMSD. (P. Ex. 39).**

See P. Ex. 1787. Independence paid the tuition and transportation for the black high school students transported to the KCMSD. (Tr. 1719, Plucker Depo. at 50 and Ex. 5 thereto). From 1945 to 1954, approximately 100 such transfers occurred. (Tr. 4560). Even if all such transferred students moved from Independence to the KCMSD, the Court finds they are of insufficient number to have had a substantial effect on the racial composition of Independence or the KCMSD. The few transfers between Independence and the KCMSD for this nine year period was not a direct and substantial cause of the racial composition of the KCMSD, Independence or any other school district. The Court also finds that the number of blacks, if any, that left Independence over the 1945 to 1954 time period because the black high school was not maintained is *de minimis.* Assuming all blacks who lived in Independence and attended high school in the KCMSD left Independence, went to the KCMSD, and did so because there was no black high school in Independence, the Court finds that any such migration has had no significant effect on the racial composition of the KCMSD, Independence or any other school district defendant.

All transfers between Independence and the KCMSD stopped immediately after *Brown.* On July 8, 1954, the Independence Board of Education adopted a resolution to accept all its black students of high school age, that is grades 9 through 12, in its junior high and high school in the fall of 1954. (P. Ex. 2254 and Plucker Depo. at 79, 82). Between 1954 and the 1957-58 school year, the remaining grades were integrated. (P. Ex. 2254, 3317 and Plucker Depo. at 85-86). The plaintiffs' expert, Dr. Orfield, testified that gradual integration of black students over a few years after *Brown,* had no significant effect. (Tr. 14,926). The Court agrees and finds that the operation of the Young school for elementary students for a short period after 1954 had no significant effect on either Independence or the KCMSD. Independence fully and adequately discharged its affirmative duty under

Brown by 1957-58, and there are no vestiges of the prior dual school system remaining.

The Independence School District experienced a steady growth in total enrollment from 1950-51 to 1970-71, when it peaked at 16,801; enrollment has steadily declined since. (P. Ex. 15A, 991B, 2967). Black enrollment, in that peak year, was 145 students or .9% of the total. (P. Ex. 53G, 991 and 991B). While the total black enrollment in 1982 was actually five less than in 1970, because of the declining white enrollment black students comprised 1.2% of the total student enrollment. (P. Ex. 53G, 991).

There is no evidence that students are assigned to schools within Independence on a racially discriminatory basis. Nor is there evidence that Independence discriminates in providing facilities, extracurricular activities, transportation, or any other student service.

Independence is a member of the Cooperating School Districts Association of Suburban Kansas City, an organization providing legislative information and group price discounts. (Goodrich Depo. at 32-34). As reiterated in the general findings, there is no evidence that this organization was formed to act or has, in fact, acted in a racially discriminatory manner. Nor is there evidence that this group was formed to harm, or has harmed, blacks or the KCMSD.

Because a portion of the Independence School District is within the municipal boundaries of the City of Kansas City, Independence supported and shared in the proceeds from the city's ½% sales tax. (P. Ex. 1999). As with other school district defendants, there is no indication that Independence's agreement to share in this tax was in any way racially motivated. (*See,* general findings at 20-21).

In regard to special education, Independence has cooperated with a number of school districts to provide a

broader range of educational programs to meet the needs of particular students. Independence sent its handicapped and special education students to various schools in the KCMSD, including the Delano School, when Independence did not have proper facilities to educate them. (Goodrich Depo. at 146). Subsequently, Independence stopped sending its handicapped students to the KCMSD because of the hardship on the students. (Goodrich Depo. at 146-48). Today, Independence provides special education for the physically and mentally handicapped in its own district. Visually handicapped children participate in the Blind-Deaf Center operated by the Blue Springs School District. (Goodrich Depo. at 146-48). There is no evidence that any of these cooperative endeavors for students with special educational needs were or are motivated by racial animus or had a racially segregative effect.

Prior to 1971, Independence provided vocational education at schools within its district. (Plucker Depo. at 118-19). Then, in 1971, the Raytown School District invited Independence to participate in its AVTS (P. Ex. 1537), and Independence agreed. (Peters Depo. at 111). The Court finds that the KCMSD did not invite or suggest to Independence that it could participate in the KCMSD's AVTS. (Goodrich Depo. at 150). The Court further finds that the KCMSD wanted to operate its own AVTS and had substantially completed the steps necessary to do so before Independence or any other school district contemplated participation in the Raytown AVTS. (Tr. 6221-22, 6360-62). (*See also*, vocational education, general findings, *supra*). There is no credible evidence that Independence's decision to participate in the Raytown AVTS and not to participate in any other AVTS was motivated by any racial animus.

The Spainhower plan was discussed and opposed by the Independence Board of Education because of its proposed elimination of local control of schools. (Peters Depo. at 71).

Due to the small portion of the Independence School District that is contained within the city of Kansas City, it would have been virtually unaffected by House Bill 171. (P. Ex. 36).

In regard to employment practices, Independence has hired teachers of all races on the basis of ability, the number of openings, and the number of applications. Independence has employed black teachers throughout its history. (P. Ex. 2967, Plucker Depo. at 119). All black teachers employed by the Independence district before the *Brown* decision were integrated into the district's faculty in the secondary schools. (P. Ex. 2255). No black teacher was fired, demoted or treated unfairly in any fashion. (Plucker Depo. at 120). And while Independence has made a good faith effort to hire every black teacher that applied, (P. Ex. 2967), some qualified black candidates have not applied because the KCMSD's salary schedule was better than that offered by Independence. (Tr. 1768, 6393 and Peters Depo. at 92). Independence has also encouraged black teachers to become administrators and is the only suburban district with a black principal. (P. Ex. 2967). The Court also finds that the proportion of black teachers in Independence is within the "acceptable range" of the "expected number" predicted by plaintiffs' statistician, Dr. Roger Carlson, even though Dr. Carlson did not consider that Independence hired five black teachers between 1973 and 1980. (Tr. 6446 and P. Ex. 2967). Even so, as fully discussed *supra,* there is no substantial or credible evidence that any relationship exists between the racial composition of the Independence faculty and the racial composition of the student body of Independence, the KCMSD or any other school district.

In regard to housing, there has been no evidence that Independence acted to lure or to encourage white families or to discourage black families from moving into Independence. Nor has Independence involved itself in

decisions of other entities relating to zoning or the type or placement of housing to be constructed within its district. (Goodrich Depo. at 63-64, Peters Depo. at 51, Plucker Depo. at 130-31). Independence has never allowed any non-resident white student to transfer to Independence from the KCMSD.

Fred Cioffi, an investigator for HEW, testified that Independence fully cooperated in his investigation of a rumor that there were transfers of white students from the KCMSD to Independence. His investigation found no such transfers. (Tr. 10,156-57).

The Court finds that Dr. Tobin's map of restrictive covenants showed few such covenants in Independence. (P. Ex. 22A). Moreover, there is no evidence that the district had any complicity in the placement or enforcement of those covenants nor is there any evidence that any black family failed to move to Independence because of those covenants. In fact, blacks now live in the neighborhoods which were covered by those restrictive covenants. (Tr. 1734).

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact on any other district, the Court will grant the Rule 41(b) motion filed by the Independence School District and its superintendent.

Lee's Summit

Lee's Summit Reorganized School District R-7 (Lee's Summit) was created in 1949 by a popular vote of the people residing in 18 rural district that were to comprise the proposed district. (Campbell Depo. at 97). Only two of the 18 rural districts operated both an elementary school and a high school; none operated a black school. (P. Ex. 150; Campbell Depo. at 72, 87). Neither the Lee's Summit R-7 nor any of its predecessor districts have ever been contiguous with the KCMSD. (P. Ex. 37).

The Court finds that the boundaries of the Lee's Summit district and the boundaries of the 18 predecessor districts were not established with a racially discriminatory intent.

With the exception of four minor boundary changes in the 1960's and 1970's, none involving the KCMSD, the Lee's Summit District remains the same today as it was in 1949. The Court finds that those boundary changes were not racially motivated and had no discriminatory impact on the Lee's Summit or any other school district. (P. Ex. 150, 258, 3330, Campbell Depo. at 116-123, Copeland Depo. at 48-50).

There was, prior to 1954, a black community in the City of Lee's Summit in the old Lee's Summit No. 79 District (now a part of the present Lee's Summit School District). (P. Ex. 37A). Many of those families had no children, (Tr. 1208-12, 1216, 1736-37), so there were never more than a few black children in Lee's Summit in the early 1900's. (Tr. 1258-60, 1267). The 1949-50 school enumeration shows only four black families in the district with children. (P. Ex. 1802).

The Court finds that except for one or two black students in only three or four isolated years between 1900 and 1954, no predecessor districts other than old Lee's Summit No. 79 had any black students. (P. Ex. 49). The Court finds that the following is the black enumeration for the old Lee's Summit No. 79 and the Lee's Summit R-7 school district for the years 1915-16 through 1954-55:

School Year	Black Enumeration
1915-1916	1
1920-1921	7
1922-1923	4
1923-1924	4
1924-1925	4
1925-1926	4
1926-1927	4

School Year	Black Enumeration
1927-1928	2
1928-1929	2
1929-1930	4
1930-1931	7
1931-1932	3
1932-1933	5
1933-1934	6
1934-1935	5
1935-1936	6
1936-1937	7
1937-1938	8
1938-1939	6
1939-1940	7
1940-1941	7
1941-1942	7
1942-1943	6
1943-1944	8
1944-1945	8
1945-1946	10
1946-1947	13
1947-1948	12
1948-1949	10
1949-1950	10
1950-1951	8
1951-1952	6
1952-1953	7
1953-1954	6
1954-1955	5

(P. Ex. 1799, 1801, 1802). The number of blacks enumerated gradually increased from 1915 until 1947. After remaining fairly constant for four years, the number gradually declined. Based on this pattern, the Court finds there was no significant depopulation in the Lee's Summit R-7 or the old Lee's Summit No. 79. If all these blacks had left Lee's Summit and moved to the KCMSD and did so because there were no black schools in the district after 1910, the numbers are still too insignificant to have any substantial segregative effect on either the KCMSD or Lee's Summit.

Because of the state-mandated separate schools, the old Lee's Summit School District operated a black school until approximately 1910, at which time it was closed because there were so few black children. (Tr. 1199-1200, 1221). Despite the fact that there were no black schools after 1910 in Lee's Summit, black families moved to the district before 1954. (Tr. 1153-54, 1212-13, 1252-53, 1285-86, 1318, 1735, 2124). The old Lee's Summit No. 79 District transported its black students, from 1930-31 to 1940-41, to the Pleasant Hill School District. From 1941-42 until 1944-45, blacks were transported to the Young School in the Independence School District. From 1944-45 until 1950-51, old Lee's Summit (and, after 1949, Lee's Summit R-7), transported black elementary students to Young and its black high school students to the KCMSD. From 1951-52 until 1953-54, all black students from the district were transported to the KCMSD. (P. Ex. 1800, 1801, 1802, 1863). The Court finds that old Lee's Summit and Lee's Summit R-7 transported black students to the KCMSD for only ten years. The total number of individual black students transferred was approximately 15, (Tr. 1256-58, 1742, and 5961, P. Ex. 1799, 1800, 1801, 1802, 1810, 1811, 1863, 3350), and the Lee's Summit District provided the transportation and tuition. (Tr. 1257, 1742, 1747, P. Ex. 3350, Campbell Depo. at 159-61, 166-67, and 172).

The Court finds the fact that the Lee's Summit School District and its predecessors did not maintain a black school from 1910 to 1954 and the fact that the Lee's Summit District transferred a *de minimis* number of black students to the KCMSD from 1945-46 to 1953-54, have not had and do not have any significant effect on the present racial composition of either the KCMSD or Lee's Summit School District.

In the 1954-55 school year, immediately after the *Brown* decision, the Lee's Summit District integrated its schools and all involuntary transfers of black students

were stopped. One black student, at her request, was permitted to attend her final year of high school in the KCMSD during the 1954-55 school year. (Tr. 1267-68, 1274-76, Campbell Depo. at 174-75). After the 1954-55 school year, all students, regardless of race, meeting the racially neutral residency requirements of the school district, were permitted to attend school in the Lee's Summit R-7. The district discharged its affirmative duty and constitutional obligations under *Brown* by, among other actions, ceasing all black transfers and admitting all students to its schools on a racially neutral basis. The Court finds there are no vestiges of the prior legally mandated segregated school system in the district.

Total student enrollment in the district steadily increased to its peak of 7,001 students in 1979 and has gradually declined since. (P. Ex. 53G, 993, 2967). The number of black students enrolled in the district has increased regularly from 1 in 1968, to 87 blacks enrolled in 1980. (P. Ex. 53G). Presently, black students are enrolled in every school in the Lee's Summit District. There is only a single high school in the district and all students attend it. (P. Ex. 2967).

Plaintiffs presented no evidence showing that the Lee's Summit District provides facilities, extracurricular activities, transportation, or any other student service on a racially discriminatory basis. Nor has there been any evidence of school site selection or closings with a discriminatory intent. Only students whose families reside in Lee's Summit R-7 or who own property in the district are permitted to attend school in the district. Those students whose parents only own property must pay tuition set off by the amount of tax paid on the property. (P. Ex. 3337, Campbell Depo. at 84-85, 107, 125-126). There is no evidence that this policy was racially motivated or applied in a discriminatory manner but is the result of sound administrative, educational, and financial concerns. There is no evidence that Lee's Summit

has acted with an intent to discriminate or to affect the racial composition of the KCMSD or any other school district at any time since the *Brown* decision. Lee's Summit is presently operating a unitary school district.

Lee's Summit joined the Cooperating School Districts Association of Suburban Kansas City for purchasing power, and were not motivated by any racial animus. (Copeland Depo. at 81-84, Campbell Depo. at 64-65).

In regard to the ½% city tax, such a small part of the City of Kansas City is in Lee's Summit, that the district's sales tax proceeds were a "very, very small portion" of the district's receipts. (Campbell Depo. at 59, Copeland Depo. at 100). The Court finds no discriminatory intent by Lee's Summit in regard to these tax receipts and the Court finds that the sales tax has had no significant segregative effect in any school district.

There have been, over the years, isolated instances where special education or handicapped students were transferred to another district. Frequently, those children were sent to private schools. (P. Ex. 3495; Campbell Depo. at 38-40, 46-48, Ex. 114 thereto; Copeland Depo. at 42, 64-65). School district records for 1975 indicate 55 students attended school in another district with tuition being paid by Lee's Summit. They were all learning disability or special education and handicapped programs. (P. Ex. 1722). The Court finds that these transfers were not done with any discriminatory intent and have had no significant effect on the present racial composition of the Lee's Summit or any other defendant school district. Nor do these cooperative arrangements abrogate the district's autonomy.

The Lee's Summit R-7 district participates in the Herndon AVTS located in the Raytown School District. The Court finds no discriminatory intent or racial motivation in Lee's Summit's participation in the Herndon AVTS, which is substantially closer than the KCMSD AVTS. (P. Ex. 34). Plaintiffs presented no evidence that the

KCMSD ever approached the Lee's Summit district about participating in an AVTS or ever invited Lee's Summit to participate in the KCMSD AVTS once it was established. The fact that Lee's Summit never participated in the KCMSD AVTS is not because of any racially discriminatory intent by the Lee's Summit District.

There is no evidence demonstrating any involvement by Lee's Summit School District in House Bill 171.

The Lee's Summit School Board took no position on the Spainhower recommendations. (Campbell Depo. at 140, Copeland Depo. at 99). Nor was race ever discussed by the Lee's Summit District in connection with the recommendations. (Copeland Depo. at 110-111).

Although there are no black faculty or staff presently employed full-time by the district, (P. Ex. 994, 2967), plaintiffs have failed to show by a preponderance this was due to racial discrimination rather than other factors such as wages or the district's location. The Court finds that affirmative steps have been taken by the Lee's Summit District yet blacks have failed to pursue, seek, or accept the employment opportunities made available to them. There have been good faith efforts by the Lee's Summit district to employ blacks. (P. Ex. 2967). In any event, as reiterated in the general order, this is not an employment discrimination case and there is no credible evidence that the hiring practices of the Lee's Summit district are the cause of the present racial composition of the KCMSD or Lee's Summit School Districts.

In regard to housing, the Court finds that the school district was not involved in any way and was in no way responsible for the development of housing or housing policies by various municipalities either entirely or partially within the Lee's Summit School District. (Campbell Depo. at 21). The only concern Lee's Summit had with housing was its impact on the number of students that would be attending its schools. (Campbell Depo. at 67). With the exception of a legitimate racially-neutral concern

about trailer parks, (because they are taxed as personalty, not realty), the Lee's Summit School District did not involve itself in zoning questions or concerns. (Campbell Depo. at 137-39, Copeland Depo. at 87-89, 92).

In regard to racially restrictive covenants, the Court notes there were very few such covenants in Lee's Summit. (P. Ex. 22). There is no evidence that the Lee's Summit School District had any complicity in the placement or enforcement of those covenants or that any person was prevented from moving to Lee's Summit because of such covenants. There is simply no evidence that the Lee's Summit School District did anything to either lure white families or discourage blacks from moving into the district or engaged in any conduct with the intent or which had the effect of affecting the racial composition of the student enrollment in the Lee's Summit School District.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by the Lee's Summit School District and its Superintendent.

Liberty

The Liberty School District serves an area in Clay County, Missouri, centered in the community of Liberty, Missouri. The school district is not now nor has it ever been contiguous to the KCMSD. (P. Ex. 1, 1A, 9). There is no evidence that the formation of Liberty's boundaries or any annexation thereafter was accomplished with the purpose or effect of racial segregation. There is no evidence that any annexation took place for other than sound educational and practical reasons.

Based on the testimony of various witnesses and exhibits admitted, the Court makes the following findings regarding the education of blacks in the Liberty School District before 1954. Pursuant to the State mandated separate

schools, the Liberty School District operated, from at least 1907, the Garrison School for blacks. Garrison had grades one through eight until 1926 when it added ninth grade. (Tr. 479). In 1930, tenth grade was added, in 1933, eleventh and in 1953 all twelve grades were available. (Tr. 2504, 5358). Then, from 1953 to 1957-58, Garrison offered only elementary grades.

Blacks from Liberty and surrounding areas such as Excelsior Springs, Plattsburg, White Oak, Mecca and Shady Grove attended Garrison. (Tr. 3523-24). There was insufficient proof that either the quality of education offered or lack of certain grades at Garrison caused an out-migration of blacks from Liberty to the KCMSD.

In the years when high school was not available at Garrison, Liberty paid the transportation and tuition to send its black students to the KCMSD. That included 7 to 8 blacks who attended Lincoln for part of the 1945 or 1946 school year before Garrison hired another teacher. (Tr. 3522). Then, during the 1953-54 school year about 20 blacks were transported to the KCMSD. (Tr. 1831). The records from the KCMSD indicate a total of 13 blacks had been transferred from Liberty to its district before 1954. (P. Ex. 1775). The totals, even when liberally calculated, show less than 30 blacks were transferred from Liberty to the KCMSD in the years prior to the *Brown* decision. The Court finds this total too insignificant to have had a substantial segregative impact on either the KCMSD or Liberty.

The Liberty High School integrated in 1954. (Tr. 1858, 2799, P. Ex. 2259), while Garrison continued to operate as a segregated elementary school through the 1957-58 school year. (P. Ex. 2263). Thereafter, and continuing to the present, the Liberty School District has been completely integrated and unitary. (P. Ex. 2264). While the Board's failure to act immediately regarding Garrison is not commendable, the Court finds that its gradual desegregation plan, which integrated all its schools

within four years of the *Brown* decision, fully complied with the constitutional requirements of *Brown II*. *See*, 349 U.S. at 299-301. Moreover, plaintiffs' expert, Dr. Gary Orfield, opined that the operation of Garrison as an elementary school for blacks until 1958 had a small effect, if any, on the residential patterns of blacks in the metropolitan area. (Tr. 14,922).

The total student enrollment in Liberty gradually increased from 3,644 in 1968 to its peak of 4,014 students in 1974 and has been declining since. (P. Ex. 53G, 995). Black enrollment during the same period has declined slightly from 124 to 101 students, for a current total of 2.7% of the student enrollment. (P. Ex. 53G, 995). There is no evidence that students are assigned to schools on a racially discriminatory basis or that facilities, extra-curricular activities, transportation, or other student services are provided in a discriminatory fashion.

Because a tiny portion of the City of Kansas City extends to the Liberty School District, it chose to participate in the ½% sales tax with the City. It received less money than any other defendant district. (P. Ex. 1999). Regardless of the amount, there is no evidence that this cooperation with the City of Kansas City had any racially segregative effect on the KCMSD or Liberty School District. (*See* general findings *supra*).

In regard to special education, Liberty, like other SSDs, may transfer some specially needy students to other districts for educational opportunities. Again, there is no evidence that Liberty's cooperation in this regard affected the racial composition of any district or compromised Liberty's status as an autonomous entity.

Liberty participates in the AVTS located and run by the Excelsior Springs School District, which is not a party to this action. There is no evidence that the Liberty School District participates with the Excelsior Springs AVTS for the purpose or the result of segregating students on the basis of race. Excelsior Springs, like Liberty,

is located north of the Missouri River and is not contiguous at any point with the KCMSD. (P. Ex. 37).

There is no evidence that the Liberty School District took any position with regard to any legislation or propositions of reorganization, specifically, H.B. 171 and the Spainhower recommendations. The Court finds that the failure of the Liberty School District to take a position on any of the reorganization matters had no effect on the racial composition of any school district. Nor has there been a showing that Liberty's participation or nonparticipation in any cooperative venture with any other school district was undertaken with the purpose or effect of segregating students in either its district or in the KCMSD.

In regard to faculty employment, the Court once again notes this is not an employment discrimination suit but a school desegregation suit. And while Liberty has employed only up to 2 black faculty members in any given school year, (P. Ex. 996), plaintiffs have failed to show a correlation between minority faculty and the number of blacks enrolled in the district. (*See* general findings *supra*). There is no credible evidence that the Liberty School District has engaged in any discriminatory employment practices nor have any complaints to that effect been filed against the district. The Court finds that of those black teachers who taught in the prior dual school system at least one stayed to teach in the integrated system, Professor Gantt, and the others left for reasons which the plaintiffs have failed to show. (Tr. 1837-38, 2381-82, P. Ex. 2254, 2265).

There has been no evidence that the Liberty School District has involved itself in decisions relating to zoning or the type and placement of housing within its district. The school district opposed trailer courts, like other school districts, not on racial grounds but because they were assessed as personalty rather than realty. (Riggs Depo. at 39-40, Stockwell Depo. at 50). The district tried to keep abreast of housing developments, (Stockwell Depo.

at 49-50), simply to provide for projected student population. (Riggs Depo. at 13, Lidikay Depo. at 132).

There were a few racially restrictive covenants identified within the Liberty School District (P. Ex. 22), but there has been no evidence that the Liberty School District either placed or enforced any of those covenants. Nor has it been shown that a single black family refrained from moving to Liberty because of a racially restrictive covenant. There is no evidence that the Liberty School District acted in any manner to attract whites or to discourage blacks from moving to the district.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will sustain the Rule 41(b) motion filed by the Liberty School District and its superintendent.

North Kansas City

The North Kansas City School District (NKC) has been in existence since approximately 1913. (Tr. 5960-61). At various times, pursuant to a vote of the people, other elementary school districts have annexed to NKC, (Doolin Depo. Vol. I at 22-23), because many of them did not have a high school within their district and had been sending students on a tuition basis to NKC. All of these districts were contiguous to NKC. (Doolin Depo. Vol. I at 20-21). There is no evidence that the annexation of these districts to NKC or any other annexation to NKC was related to race or had a discriminatory effect. In 1962, NKC passed a resolution advising surrounding districts without high schools that were sending their high school students to NKC on a tuition basis that NKC could not continue to accept such students due to overcrowding and financial considerations. (Doolin Depo. Vol. I at 44). Race played no part in this policy. There is no evidence that NKC established, decreased, enlarged or maintained its boundaries for any reason related to race.

In regard to the education of black students prior to 1954, the Court makes the following findings based, unless otherwise specified, on the testimony of Ms. Pratt Davis, Ms. Feeler and Mr. Waller. (*See* Tr., Oct. 31 and Nov. 1, 1983). From 1900 to 1954, there were some black families residing within the present boundaries of the NKC school district. The largest community of blacks was in the White Oak area, from 1915 to the 1940's. Because Missouri mandated separate schools, the black children attended the White Oak Elementary School, supported by the rural black community. Between 15 to 17 students were enrolled in that school. (P. Ex. 2397). The White Oak school operated intermittently until 1944. (P. Ex. 39). Those students wishing to go to high school traveled either to Garrison in Liberty or to R. T. Coles and Lincoln in the KCMSD with NKC paying their tuition and transportation. According to planntiffs' expert, Dr. Anderson, about 10 to 15 students transferred to the KCMSD from the NKC area between 1900 and 1954. (Tr. 5960-61).

The total number of transfers from NKC to the KCMSD prior to 1954 did not have a substantial current effect on the racial composition of either district. Even if the Court concludes, which it does not, that the blacks living in NKC before 1954 moved to the KCMSD for schools, the numbers are too insignificant to have other than a *de minimis* effect on any defendant school district.

The Court finds that immediately after the *Brown* decision, the 1954-55 school year, the remaining black children in the district, the Pratts, were given the option of attending NKC schools or attending one more year in the KCMSD. (P. Ex. 2942, Schooling Depo. at 26-27). Because of various school activities in which the children were engaged, Mrs. Pratt elected to have her children continue in the KCMSD. One of her children, Ms. Shirlene Pratt Davis, testified at trial that no such option was provided. (Tr. 162-63). The Court does not find

her testimony credible because she was only sixteen years old at the time and may have been at work during Dr. Schooling's visit with her mother. (Tr. 101, 204).

Even if the Court accepted Ms. Pratt Davis' version as true, the interdistrict transfer of the Pratt children is too insignificant to have had any effect, much less a substantial current effect, upon any school district.

The Court finds that NKC discharged its affirmative duty and constitutional obligations under *Brown* by, among other things, ceasing all black transfers and admitting all students to its schools without regard to race by 1955. There are no remaining vestiges of the prior dual school system in the district.

Presently, students are assigned to schools within NKC on a racially neutral basis. Attendance zones within NKC have been drawn without regard to race and without any intent to discriminate. (P. Ex. 997A, Waier Depo. at 74 and 241). There is no evidence of race discrimination on the basis of providing facilities, extracurricular activities, transportation or any other student service.

The school district's total enrollment steadily increased from 1953 to its peak in 1970 and has gradually declined since. (P. Ex. 2967). Black student enrollment has grown from zero in 1968 to 174 in 1984. (P. Ex. 53G, 997, 997A, and 2967).

While there was testimony of race discrimination against one black child in the Briarcliff Elementary School in 1974, it was a matter of intradistrict concern and has had no interdistrict effect. (Tr. 227).

A few witnesses testified that the North Kansas City area once had a reputation of being inhospitable to blacks. The Court finds that there is no evidence that NKC school officials or *any* school district caused or contributed to cause this alleged reputation. Nor does the Court find it relevant or significant as a possible interdistrict effect.

Because a portion of Kansas City extends into NKC, it agreed to share in the ½% sales tax. (P. Ex. 1999). Again, no evidence exists tending to show this cooperation with the City of Kansas City had a racially discriminatory purpose or effect.

Over the years, a few handicapped children or other special educationally needy students have been transferred to specialized schools in other districts. There is no evidence that NKC discriminated in this area or that these determinations were made in a manner that was not racially neutral.

NKC has never participated in a cooperative vocational education project with another school district. (Doolin Depo. Vol. I at 47). The decision to provide vocational education in the NKC schools and not to participate in any cooperative vocational education program is not related to race. Further, there is no evidence that the KCMSD ever contacted NKC to propose any sort of cooperative vocational educational program involving those two districts. (Waier Depo. at 130).

NKC supported passage of House Bill 171, not for racially discriminatory reasons but for tax and local control reasons. (P. Ex. 430, Doolin Depo. Vol. II at 118-120).

In regard to faculty employment, there is no evidence that faculty or other school staff are assigned within NKC on a discriminatory basis. NKC has followed the practice of hiring the best person available for an open position. (Waier Depo. at 140-43, Atkin Depo. at 34 and P. Ex. 2967). The number of black teachers in NKC has increased from one in 1972-73 to fifteen in 1980. (P. Ex. 998 and 2967).

Plaintiffs' employment discrimination evidence against NKC is premised primarily upon the analyses and opinions of their statistician, Dr. Carlson. The Court finds Dr. Carlson's opinions in regard to NKC unpersuasive.

Dr. Carlson calculated that NKC had only hired three black teachers between 1973 and 1980 when the correct number was 14 to 15 black teachers hired. (P. Ex. 998 and 2967). The correct number is within two standard deviation points of Dr. Carlson's predicted number of hirees. (P. Ex. 721F, Table G). Furthermore, as described more fully in the general findings *supra*, there is no credible evidence of any correlation between the racial composition of a school district's faculty and staff to the racial composition of its student body. Plaintiffs' own evidence refutes their theory: the black enrollment in the Hickman School District has grown rapidly from 29 (.20%) in 1968 to 1,497 (16.70%) in 1982. (P. Ex. 53G). This increase took place while Hickman Mills, according to Dr. Carlson's data, hired eight black teachers from 1970 to 1983. (P. Ex. 721F, Table G). That number is less than that hired by NKC. The numbers simply do not reflect a correlation between the racial composition of the staff and the student body.

In regard to housing, there has been no evidence that NKC acted to lure or encourage white families to move into NKC or to discourage black families from moving there. In fact, it has been NKC's policy not to attempt to influence the type of housing that was built or not built in the district. (Doolin Depo. Vol. I at 119, Ewing Depo. at 27, 106, and Waier Depo. at 77, 79-80). The Court finds there is no credible evidence of housing discrimination in NKC that has had a substantial interdistrict segregative effect. Dr. Tobin's map showing restrictive covenants cited very few such covenants in NKC. (P. Ex. 22). In fact, much of the NKC development occurred after the Supreme Court mooted the effect of these covenants in 1948. *See, Shelley* v. *Kraemer*, 334 U.S. 1 (1948). In any event, there is no evidence that the NKC School District participated in the placement, encouraged the enforcement of these covenants or that any blacks failed to move to the district because of the covenants.

The NKC district is interested in housing only to the extent of planning construction of schools and accommodating the students generated by the new housing. (Doolin Depo. Vol. I at 30, 33, 124, and Ewing Depo. at 23). These actions by NKC were in no way related to race but were simply to plan to meet the educational needs of the district's students. In a few instances, NKC contacted zoning officials about zoning matters when it was necessary to arrange for rezoning or the like to accommodate the purchase or sale of property which the school district owned or wished to acquire. (Doolin Depo. Vol. I at 33). These contacts were not race related and did not impact upon the race of students attending KCMSD schools.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substanital segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by NKC and its Superintendent.

Park Hill

Park Hill Reorganized School District No. 5 (Park Hill) is located wholly within Platte County, Missouri (Harmon Depo. at 31), and is not contiguous to the KCMSD. (P. Ex. 22A). The school districts in Platte County were consolidated and reorganized between 1949 and 1951 with the Park Hill District coming into existence as a result of a consolidation of five school districts with the old Parkhill School District in 1950, followed by a reorganization of six additional districts with the Consolidated District in 1951. All took place pursuant to a popular vote of the residents of the affected areas. (Aikmus Depo. at 22-23 and Ex. 3 and 4 thereto). The area encompassed by the Parkhill School District was rural and agricultural prior to 1947. (Tr. 1499, 2718, 3169, 3182, 3138, 13,022-23, P. Ex. 22 and 22A). The Court finds that the establishment of the Park Hill boundaries

in 1951 were not racially motivated and have not had any segregative effect in either the Park Hill district or any other school district and there have been no significant boundary changes since that time. (Jones Depo. at 56-57, 74-75, Harmon Depo. at 32-34 and Shipley Depo. at 27, 68-70).

Historically, there was a black community in the area that became the Park Hill District, centered in the town of Parkville. (*See, e.g.*, P. Ex. 2, 8B, 37, 37A, 51A and 51B). In 1900, there were approximately 250 blacks in the two townships, Pettis and Waldron, that subsequently became what is the Park Hill School District. (May Township as constituted in 1900 was also part of what became the Park Hill District, but had few blacks. *See* P. Ex. 51A). By 1910 the black population of Pettis and Waldron Townships had decreased by 66 persons, and the white population had decreased by over 400. (P. Ex. 51A). Since Waldron was the more agricultural area (Tr. 2718-19, 3138 and 3182), it is reasonable to infer that the decline in population between 1900 and 1910 was associated with the decline in the availability of agricultural employment and supports the conclusion that the decline in black population in this area was the result of economic changes in agriculture rather than the availability of schools. Between 1910 and 1960, the black population in the area covered by Pettis and Waldron Townships decreased by fewer than 50. (P. Ex. 51A). The black population of Pettis Township mostly concentrated in Parkville, where jobs were available. (Tr. 329-330, 1466, 2720, 3169 and 3221). The Court finds from the weight of the credible evidence that economic conditions and employment opportunities, rather than schools, were the significant factors affecting choice of residence by those blacks leaving and those blacks remaining in the Park Hill area between 1910 and 1960.

Even if schools were a significant factor in the out-migration of blacks from the Park Hill area subsequent to

1910, the Court finds that the numbers of persons out-migrating from the Park Hill area to be so minimal that it could not have had any effect on the racial composition of Park Hill schools or schools in any other district including the KCMSD.

As of the 1940's, there were 15 to 20 black families residing in Parkville and several more families to the west of town. (Whipple Depo. at 21-22, Jones Depo. at 10-11 and Tr. 3165-69, 3242). Only one black family did not reside in the immediate Parkville area, the Pearl family, (Jones Depo. at 35), but resided on a farm located in what became part of the Platte City district. (Tr. 3143 and 3158).

Since at least 1903, the old Parkville district (and Park Hill after 1951) continuously operated a black elementary school, Banneker, in Parkville. (Tr. 2828, P. Ex. 77A, and Jones Depo. at 48). From at least 1924 on there were between 25 and 30 students in that school. (Tr. 2828, 3181 and Jones Depo. at 48). According to various witnesses (Curtis, Hoskins, Jackson and Douglass), Banneker accepted blacks from surrounding black communities, used old books and supplies from Grayden Elementary (white school) and those purchased by the teachers from personal funds. Banneker operated as a segregated black elementary school until it was closed in 1959. (P. Ex. 39, 2278). There was insufficient proof that either the quality of education offered or lack of certain grades at Banneker caused an out-migration of blacks from Park Hill to the KCMSD. The Court finds that the operation of Banneker school could not and did not have a significant segregative effect upon the Park Hill District, the KCMSD or any other district.

Although there was no high school for blacks in what now constitutes the Park Hill School District, there is no evidence that black high school students from the area attended the KCMSD schools prior to 1940. (P. Ex. 1775). The evidence is that some black Parkville stu-

dents attended Summer High School in Kansas City, Kansas and others attended Kansas Vocational School (KVS) and still others attended church-related schools in both Kansas City, Missouri and Kansas City, Kansas. (Tr. 3170, 3187, 3189, 3226-27).

Between 1940 and 1956, black high school students from Parkville (up to 1951) and the Park Hill (after reorganization in 1951) districts attended the KCMSD schools. Tuition and transportation were paid by the Parkville and, subsequently, the Park Hill School District. (Tr. 1477-78, 3228-29, Jones Depo. at 27-28). No more than 7 students were transported in any year, and somewhere between 11 and 16, total, were actually transferred to the KCMSD schools from Parkville. (Tr. 2839, P. Ex. 1775, 1831, 2271A). The transfer of so few students to the KCMSD did not have any significant effect upon the racial composition of the Park Hill District, the KCMSD or any other district nor was it a cause of depopulation within the Parkville and the Park Hill District or impaction of blacks within the KCMSD.

On August 9, 1954, the Park Hill Board of Education decided to postpone desegregation of the high school for one year until the final decision of the Supreme Court in *Brown*. (P. Ex. 2270, Fickle Depo. at 33-34). In August, 1955, the Board again took up desegregation of the high school (at that time there were 42 blacks enumerated, 13 of high school age, (P. Ex. 2269), and voted to furnish tuition and transportation to the KCMSD for the 7 who enrolled for the 1955-56 school year. (P. Ex. 2271A). While the Board's failure to act immediately on the *Brown* decision is not commendable, the minutes reflect some genuine concerns about the students and their preferences and do not reflect any overt refusal to abide by the decision of the Supreme Court or any racial animus. (P. Ex. 2271). Park Hill High School was integrated in the 1956-57 school year, the junior high was integrated in the 1957-58 school year and the elementary

schools were integrated in the 1959-60 school year. (Tr. 2740, 2831, 2848, 2857 and Jones Depo. at 35-36, 103). Even though the Park Hill district did not completely integrate until five years after *Brown I*, the Court finds its gradual desegregation was within a constitutionally acceptable time span under *Brown II*. 349 U.S. at 299-301. In any event, there was no segregative impact upon any other defendant district. Since 1959 the Park Hill District has operated a unitary, fully integrated school district. (Tr. 1507). Black students attend each of Park Hill's schools (P. Ex. 999), and all students, regardless of race, attend neighborhood schools. (Tr. 1507, 1509).

There is no evidence that any person moved into or out of the Park Hill School District to the KCMSD or elsewhere because of the continued operation of segregated schools between 1954 and 1959. Additionally, Dr. Orfield, plaintiffs' expert, testified that the continued operation of segregated schools in Park Hill and other districts beyond 1954 had, at most, a small effect on residential patterns. (Tr. 14,926). In view of the foregoing, the Court must conclude that the continued operation of segregated schools until 1959 had no significant segregative effect on either the Park Hill School District or any other school district including the KCMSD and was not a cause of depopulation or impaction. The Court further concludes that the vestiges of the prior dual school system have been fully eliminated.

The number of black students in Park Hill schools has increased since 1976 a total of 110 students, while at the same time, the overall student population has fallen by 600 students. (P. Ex. 20A, 2967). The continued increase in black enrollment in the Park Hill District suggests that there are no remaining effects of the prior dual school system in that district.

Because a portion of the Park Hill School District is within the municipal boundaries of the City of Kansas City, Park Hill supported and shared in the proceeds of

the city's ½% sales tax. (P. Ex. 1748). As with other school district defendants, there is no indication that Park Hill's agreement to share in this tax was in any way racially motivated or had any racial impact.

The Park Hill District participates in the Platte City AVTS, a district not a party to this litigation. Both Park Hill and Platte City are contiguous districts north of the Missouri River, neither of which border the KCMSD. (P. Ex. 34). There is no showing that Park Hill's participation in this AVTS and not in KCMSD's AVTS is for other than obvious reasons of closeness and administrative convenience.

There is no evidence that Park Hill took any position with respect to House Bill 171 or with respect to the annexation of parts of the Park Hill School District by the City of Kansas City.

The Park Hill School District adopted a resolution on February 10, 1969 (P. Ex. 1728) indicating that it was opposed to the Spainhower recommendations because of the Board's concerns with finances, local control and representative government. (Harmon Depo. at 133-137). Such opposition was not motivated by racial animus and has not been shown to have had any significant effect on the passage or failure of any legislation.

While the records indicate Park Hill has hired few black faculty or staff, (P. Ex. 1000, 2967), plaintiffs have not established the number of blacks who applied for employment with the district. Nor is there any evidence that any black applicant for employment has ever been turned down by the Park Hill School District. There is no evidence that any person was not hired or was terminated by the Park Hill School District by reason of race. The evidence is that the school district's hiring practices are racially neutral and designed to affirm equal employment opportunity. (P. Ex. 2967, Jones Depo. at 93, Howard Depo. at 67-69, 113 and Shipley Depo. at 55-

57). Again, absent a nexus between faculty racial composition and student body racial composition, this evidence has no bearing on liability in an interdistrict case. (*See* general findings *supra*).

The Park Hill School District generally avoided all involvement in housing matters within its borders. (Jones Depo. at 45-46, Harmon Depo. at 49-52 and Shipley Depo. at 32-33). The district never opposed or took a position against apartments, trailer courts or subsidized housing and all are present within the district. Harmon Depo. at 49-52, 120-121 and Shipley Depo. at 32-33, 80). The district never took an active role in zoning matters, other than one incident involving a commercial development adjacent to one of its schools where service of alcohol was involved in addition to a boundary dispute. (Jones Depo. at 45-46, Harmon Depo. at 49-52, 120-121, Shipley Depo. at 32-33 and Howard Depo. at 31-35). Traditionally, the district's only involvement in development within its boundaries was an attempt to purchase school sites in areas where development was likely to occur. (Jones Depo. at 45-46, Harmon Depo. at 41-44, 115-116, 162 and Howard Depo. at 23). The Court finds no evidence that the Park Hill District was involved in making or carrying out housing policies. Further, the actions of the school district had no effect on the racial residential patterns within the Park Hill District and no interdistrict effect on racial residential patterns.

The Court finds there were 33 restrictive covenants identified in Platte County, most of them put in place between 1940 and 1950. (P. Ex. 22, 1239A). Before the *Shelley* v. *Kraemer* decision, 334 U.S. 1, the entire population in the county only increased by approximately 1,000 people. (P. Ex. 16A). Obviously, these covenants did not create a "white haven" in the county. The Court finds that the existence of the restrictive covenants had no effect on racial residential patterns within the Park Hill School District. Furthermore, there is no evidence

that the school district had any complicity in the placement or enforcement of those covenants.

The Court finds that the Park Hill School District has neither lured white families or discouraged black families from moving to the district. Plaintiffs' witnesses could only place three families from the KCMSD in the Park Hill School District.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact in any other district, the Court will grant the Rule 41(b) motion filed by Park Hill and its Superintendent.

Raytown

Consolidated School District No. 2 (Raytown) resulted, by popular vote of the people, from the consolidation of several rural school districts in 1903. (Herndon Depo. at 32-33). There have been no annexations or boundary changes since its formation, (Herndon Depo. at 34), and no evidence of a racially discriminatory intent or effect therefrom. Raytown is contiguous to the KCMSD on the east, southeast. (P. Ex. 37).

The Raytown Board of Education passed a resolution on July 7, 1975, that opposed any measure that would change, divide or enlarge its existing boundaries. (P. Ex. 2194). Although the KCMSD is mentioned in the resolution, the Court finds this was a vote affirming local control; there is no evidence of discriminatory purpose or impact. Moreover, the resolution was a nullity because the people in the district, by petition and vote, could change their boundaries notwithstanding the Board's position.

Prior to 1954, there were no black enclaves or communities within the boundaries of the Raytown School District (P. Ex. 37A, Lowell Depo. at 8-9, 14). No black students, therefore, were transported out of the Raytown

District to the KCMSD or any other district, (Lowell Depo. at 9), nor was there a need for separate schools as mandated by the state. Plaintiffs have failed to show that the absence of a separate school for blacks within the Rayton School District prior to 1954 precluded any blacks from settling there.

The Raytown School District experienced a steady growth in total enrollment from 1953-54 to 1969-70, when it peaked at 16,058; enrollment has gradually declined since. (P. Ex. 2967, Herndon Depo. at 44). No black students resided within or were enrolled in the Raytown School District during the 1953-54 or the 1954-55 school years. (Lowell Depo. at 13-14). Because the district did not maintain records of the race of the students during the 1960's, (P. Ex. 2967), the Court cannot ascertain when blacks were first enrolled. The number of blacks has increased in the past decade from 13 enrolled in 1970 to 673 enrolled, 7.6% of the student body, in 1982. (P. Ex. 53G, Ex. 1001).

Because a portion of the Raytown School District is within the municipal boundaries of the City of Kansas City, (Lowell Depo. 8-9), Raytown supported and shared in the proceeds from the City's ½% sales tax (P. Ex. 1999). As with other school district defendants, there is no indication that Raytown's agreement to share in this tax was in any way racially motivated.

There are some students residing within the Raytown School District that have attended school in other districts because of handicap or for special education. (Atkin Depo. at 93-95, 97-98). Plaintiffs have not shown that such attendance for special education was influenced by or based on racial considerations. These transfers had no effect, in any event, upon the racial composition of Raytown or any other defendant district. Nor did the cooperative arrangements diminish the district's autonomy.

The district provides its students with vocational education at its Joe Herndon Area Vocational-Technical School

which was built after state approval in the early 1970's and opened in the 1973-74 school year. (P. Ex. 1537, Sheets Depo. at 16, 17-19). The decision to build an AVTS in the Raytown School District followed the expression of interest in participating in such a school by the Center, Grandview, Hickman Mills, Independence, and Lee's Summit School Districts. (P. Ex. 3271, Herndon Depo. at 124-128). There is no evidence that the creation of the Herndon AVTS nor the districts that sought to join therein were motivated in any way by a discriminatory purpose. The Herndon AVTS has operated at 80% to 90% of capacity throughout most years of its operation. (Sheets Depo. at 39). It has never received any requests from a student or from any district for exchange of students between the Herndon AVTS and any other AVTS. (Sheets Depo. at 54).

In 1980, the Office for Civil Rights conducted an on-sight review and investigation of the Herndon AVTS and concluded the vocational-technical programs were being provided in compliance with the non-discrimination requirements of Title VI of the Civil Rights Act of 1964. (P. Ex. 453). There is no showing that the racial composition of the student enrollment at the Herndon AVTS has had any effect upon the racial composition of any defendant school district.

In regard to H.B. 171, the Raytown Board of Education voted in 1956 to request an opinion from the Attorney General whether any part of its district would be absorbed into the KCMSD if the City's population exceeded 500,000. (P. Ex. 2191). No evidence exists, however, relating this request to other than racially neutral concerns over local control and administration.

The Raytown School District opposed the Spainhower recommendations not because of any racial animus, but because it was not administratively feasible. (Herndon Depo. at 71-72).

While the records indicate Raytown has hired few black faculty, (P. Ex. 1002), plaintiffs have not established the number of blacks who actually applied for employment with the district. Instead, they rely upon the statistical analysis of Dr. Carlson who computed faculty availability for the entire SMSA. (P. Ex. 721). (*See* general findings *supra*). Plaintiffs have not established with credible evidence that there was any racial discrimination in the district's employment decisions. (P. Ex. 2967).

In regard to housing, the Court finds there is no credible evidence that the Raytown School District took any action or position which prevented any black family from moving to that district. (Herndon Depo. at 22, 41, Atkin Depo. at 141). Nor is there any credible evidence that Raytown took any action or position which enticed or lured any white family from the KCMSD to Raytown. The map prepared by Dr. Tobin, (P. Ex. 22), shows that there were racially restrictive covenants in the Raytown School District, but there is no evidence which tends to prove that the district had any complicity in the placement or enforcement of those covenants nor is there any evidence that any black family failed to move to Raytown because of those covenants. The continued increase in the number of blacks enrolled in Raytown (P. Ex. 53G, and Ex. 1001), is convincing evidence that there is no barrier to blacks moving to the Raytown School District nor is there any present effect of any past practices which may have had a discouraging effect on black moves.

While there was some evidence that the Raytown area has a reputation of being inhospitable to blacks, (*see, e.g.*, Cleaver's testimony), plaintiffs adduced absolutely no evidence that the school district or its officials caused or contributed to cause that reputation.

The only position which the Raytown district took with respect to any housing or zoning matters was its opposition to trailer courts because of their taxation as personalty rather than realty. (Herndon Depo. at 40-41).

There is simply no evidence that the Raytown School District engaged in any conduct relating to housing matters which had the intent or effect of affecting the racial composition of the student enrollment in the Raytown District or in any other defendant school district.

Having failed to establish any intentional racially discriminatory acts or omissions by these defendants which have had a substantial segregative impact on any other district, the Court will grant the Rule 41(b) motion filed by the Raytown School District and its Superintendent.

CONCLUSION OF LAW

For ease of discussion and understanding, various legal standards have been included in the pertinent fact-finding sections of this order *supra*. They are hereby incorporated as conclusions of law. In some instances, only brief remention of certain cases may be made.

As indicated earlier, the touchstone of an interdistrict school desegregation case is *Milliken* v. *Bradley*, 418 U.S. 717 (1974). *Milliken* teaches that before district boundaries may be ignored or school districts consolidated for remedial purposes, there must be evidence of a constitutional violation in one district that produces a significant segregative effect in another district. The racially discriminatory acts must be a substantial cause of interdistrict segregation. 418 U.S. at 744-45. The absence of an interdistrict violation and interdistrict effect requires interdistrict relief to be denied. *Id.*

The theories offered here have been considered—and rejected—by the Supreme Court in *Milliken*. For example, upon finding violations within the predominantly black city district but not in the surrounding predominantly white suburban districts, the Court declared, "Where the schools of only one district have been affected, there is no constitutional power in the courts to decree relief balancing the racial composition of that district's schools with those of the surrounding districts."

418 U.S. at 749. After assessing the evidence, the Supreme Court held, "Disparate treatment of white and Negro students occurred within the Detroit school system, and not elsewhere, and on this record the remedy must be limited to that system." *Id.* at 746. To award the relief plaintiffs seek here would be contrary to the express mandate from the High Court because it "would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in *Brown I* and *II* or any holding of this Court." *Id.*

The cause and effect nexus cannot be overemphasized. As the Fifth Circuit recognized, "[t]he court's deliberate choice [in *Milliken*] of phrases such as 'substantial' or 'direct cause' and 'significant segregative effect' expresses an insistence that in cases where an interdistrict remedy is requested, there must be clear proof of cause and effect and a careful delineation of the extent of the effect." *Lee* v. *Lee County*, *supra*, 639 F.2d at 1256. Not only is plaintiffs' evidence here blurred as to cause and effect, there is no "careful delineation of the extent of the effect."

Another recent Fifth Circuit decision elaborated on the Supreme Court's requirement of an "interdistrict violation": "The requisite segregative intent must be not simply to discriminate within the offending system but further a clear intent to cause segregative effects within the neighboring district." *Taylor* v. *Ouachita Parish School Board*, 648 F.2d 959, 969 (5th Cir. 1981). As clearly evident by the findings of fact made herein, plaintiffs have failed to prove that conduct by *any* SSD met this standard.

Furthermore, the Court has rejected plaintiffs' "effects" argument which would have held the SSDs liable and incorporated them in an interdistrict remedy on the basis of alleged wrongs committed by other actors, e.g., the state. The *Taylor* court also rejected the "effects" argument reasoning if:

> [i]nterdistrict effect alone transform otherwise intradistrict unconstitutional actions into an interdistrict violation, then the *Milliken* insistence that 'without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy' contains a redundancy: the only interdistrict thing about the violation would be its effect.

648 F.2d at 969.

As articulated in *Columbus Board of Education* v. *Penick*, to make out a fourteenth amendment equal protection claim, plaintiff *must* show a discriminatory purpose, not just disparate impact and foreseeable consequences. 443 U.S. 449 (1979). Plaintiffs' evidence simply does not make the intentional cause and effect connection.

This Court is compelled to follow the frequent admonition from the Supreme Court to tailor the remedy to fit the scope of the violation. *Dayton Board of Education* v. *Brinkman*, 443 U.S. 526 (1979) (Dayton II), *Hills* v. *Gautreaux*, 425 U.S. 284, 293-94 (1976), *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The Court in *Dayton* specifically criticized the lower court for aggregating a series of violations to add up to a significant "cumulative" violation—a procedure plaintiffs would have us adopt here. The Court notes *Dayton* was not an interdistrict case; however, the message gleaned is to correct only the violations found, and nothing more expansive is justified or permissible. Therefore, the constitutional violation must be substantial. Neither cumulative nor *de minimus* violations will justify interdistrict relief. 433 U.S. 406, 413 (Dayton I). At most, plaintiffs' evidence is only *de minimus* and is therefore legally insufficient to justify the relief sought against the suburban school district defendants.

A review of the legal standards applicable to various issues raised by plaintiffs confirms the Court's conclusion.

Pre-1954

The parties stipulated to the existence of the state mandated dual school system and the Court took judicial notice of the fact that private discrimination and segregation were prevalent in years past. Nonetheless, plaintiffs presented months of testimony regarding discriminatory conditions existing from the turn of the century to the *Brown* decision in 1954. For the Court today to find a constitutional violation based on that evidence, however, plaintiffs needed to prove by a preponderance that the SSDs were the original segregative actors and that vestiges of those past acts remain. It is in this latter respect that plaintiffs' proof floundered. Regarding physical segregation in schools during the early decades of this century, the Supreme Court stated "[b]oth by reason of the substantial time that [had] elapsed and because these practices have ceased, . . . the foregoing will not necessarily be deemed to be evidence of a continuing segregative policy." *Dayton I*, *supra*, 433 U.S. at 411. The Court has found no continuing segregative policy by these defendants.

Another factor negating the importance of plaintiffs' voluminous pre-1954 evidence is simply its age. Our society is dynamic; myriad factors produce a multitude of simultaneous decisions and consequent effects. If it were a stagnant entity, the pernicious effects of de jure segregation would be obvious. Due to its fluid nature, however, acts now 30 years past have negligible present effects. Such is the fate of the discriminatory practices plaintiffs took months to develop. Too many events have intervened, reshaping earlier actions. *Lee* v. *Lee County*, *supra*, 639 F.2d at 1259.

The Brown Duty

Plaintiffs' evidence also supports the Court's conclusion that all SSDs have met their constitutional obligation to operate a unitary school system. That obligation was initially articulated in *Brown II* 349 U.S. at 300: "At stake

is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis." Defendants are required to "make a prompt and reasonable *start* toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner." *Id.* (emphasis added). As the findings in the individual district sections show, each suburban district, within a maximum of four years of *Brown*, was sending its students to school without regard to race. Most districts were doing so within one year of the *Brown* decision. (See individual findings *supra*). Prior to *Brown* and pursuant to state statute, the local school districts had been operating a dual school system. Certainly such prompt action dismantling the dual system following *Brown* was accomplished "with all deliberate speed." 349 U.S. at 301. The duty of each SSD was to dismantle its dual school system; not the dual system in some other district.

And once a racially neutral school system had been established, racial imbalance resulting from other than purposely segregative acts is beyond the authority of the Court to correct. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *See also Ross* v. *Houston Independent School District*, 699 F.2d 218, 225 (5th Cir. 1983) ("[s]chool officials who have taken effective action have no affirmative 14th amendment duty to respond to the private actions of those who vote with their feet.") The constitution does not compel school officials to correct conditions over which they have no control, like residential choices. *Berry* v. *School District*, 442 F.Supp. 1280, 1326 (W.D. Mich. 1977) *aff'd* 698 F.2d 813 (6th Cir.), *cert. denied* 104 S.Ct. 235 (1983). The Court well remembers the observation of the Supreme Court that there is just so much baggage that a school case can carry. *Swann, supra*, 402 U.S. at 22-23. Moreover, evidence of housing discrimination was presented in the *Milliken* case and discussed in the concurring and dissenting opinions (418 U.S. at 753, 757, 762 & 781) yet

the majority opinion was based on findings regarding conduct by school officials, not housing actors.

Housing

Plaintiffs, however, relying on certain language in Justice Stewart's concurring opinion in *Milliken*, seek to encompass the SSDs in an interdistrict remedy because of an alleged nexus between housing discrimination and school segregation. Justice Stewart indicated an interdistrict remedy might be imposed "[w]ere it to be shown, for example, that state officials had contributed to the separation of the races . . . by purposeful, racially discriminatory use of state housing or zoning laws. . . ." 418 U.S. at 755. He also stated, however, that the existence of a predominantly black school population in the city "core" cannot be changed by federal courts "unless and until it is shown that the State or its political subdivisions, have contributed to cause the situation to exist." 418 U.S. at 756 n.2. Therefore, even applying the standards suggested by Justice Stewart, plaintiffs either had to prove intentional segregative acts by each school board sought to be included or that the SSDs were mere agents of the state causing alleged constitutional violations by the state to vicariously inure to the SSDs.

Plaintiffs proved (if such proof was necessary) that there is a nexus between housing patterns and school composition. The two are inextricably intertwined:

> People gravitate toward school facilities, just as schools are located in response to the needs of the people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner city neighborhoods.

Swann, 402 U.S. at 20-21. However, proof of the connection alone is insufficient to find liability. And plaintiffs' evidence of segregative *acts by the SSDs* was anemic.

As already discussed, within a few years of *Brown*, each SSD was operating a unitary school system. The post-*Brown* actions purportedly evidencing "vestiges" of segregative intent, (for example support or opposition to legislative proposals, zoning changes, trailer parks, apartments and annexations) hardly support an inference of a constitutional violation by the SSDs much less an explicit finding of a *substantial* constitutional violation.

As discussed earlier, to find the SSDs vicariously liable for acts of the state, the Court must make the threshold determination that the SSDs are mere agents or arms of the state and not independent, locally autonomous entities. After applying the test for autonomy as directed by *Milliken*, the Court already concluded the SSDs are independent and their boundaries must be respected.

Whether plaintiffs' evidence was sufficient to sustain a finding of liability against other actors in the housing market is irrelevant to the instant motions to dismiss filed by each SSD defendant. The nexus necessary must be between the conduct of the defendant school districts and actions of those responsible for shaping residential patterns. The absence of such a connection forbids a finding of liability against the SSDs to remedy any racial imbalance that may be attributed to those housing market actors. *Bell* v. *Board of Education*, 683 F.2d 963 (6th Cir. 1982).

Faculty

The Court has already found that the faculty and staff composition of the SSDs does not affect the racial composition of the student bodies therein. The Court noted that any intradistrict or purported employment violations have no relevance unless shown to have an interdistrict effect. Furthermore, the evidence did not even support a finding of intradistrict discriminatory hiring or promotion policies by the SSDs. The duty, which each SSD has fulfilled, is to make a sustained good faith effort

to recruit minority faculty members, *Oliver, supra,* 706 F.2d at 762.

The Court refuses to apply an intradistrict factor, faculty imbalance, (*see e.g. Swann, supra,* 402 U.S. at 18-20), and conclude therefrom that an interdistrict violation exists. There is simply no law to support plaintiffs' proposition.

Furthermore, as evidenced by the SSDs' answers to interrogatories, the districts have been hiring on a racially neutral basis for many years thus weakening any effect the past dual school system may have had. *Dayton I, supra,* 433 U.S. at 411.

Findings by Other Courts

The findings made herein are wholly consistent with the law as applied in this Circuit. Probably the most distinguishing feature between this and the *Liddell* litigation is the fact that no trial, resulting in a finding of liability against the suburban districts, was ever held. A plan was devised to remedy school segregation existing within the city schools in which the state was to fund a portion. Regarding the suburban districts, however, the plan could only provide incentives for their *voluntary* cooperation:

> [T]he district court can require existing defendants —the state and city school board—to take the actions which will help eradicate the remaining vestiges of the government-imposed school segregation in the city schools, including actions which may involve the *voluntary* participation of the suburban schools. For example, the district court could
>
> * * * *
>
> (4) require the state to provide additional incentives for *voluntary* interdistrict transfer.

Liddell v. *Board of Education*, 677 F.2d 626, 641-42 (8th Cir.) (Liddell V) *cert. denied*, 103 S. Ct. 172

(1982) (emphasis added). As the Eighth Circuit commented,

> Many of these ideas and techniques require cooperation by the suburban schools, others do not. To the extent that suburban schools are *willing to cooperate*, the plans requiring their participation can now go forward. To the extent they are unwilling to do so, the 12(c) plans must be tailored to be effective without their mandated participation. We emphasize that suburban schools that *voluntarily* participate will not by such participation admit liability or waive any right that they may presently have to be excluded from a plan of mandatory interdistrict desegregation.

Id. at 642 (emphasis added). The ruling is abundantly clear that absent a finding of liability on the part of each SSD, they cannot be compelled to participate in an interdistrict plan; only by their voluntary cooperation could interdistrict transfers be considered. The *Liddell* court did conclude that because the state was the primary constitutional violator, mandating that it fund voluntary interdistrict transfers was settled as the "law of the case." *Liddell* v. *Board of Education*, No. 83-1957 slip op. at 28 (8th Cir. Feb. 8, 1984) (Liddell VII). Such is not the issue nor posture of the case here.

Comparison of this increasingly familiar record with other cases in which an interdistrict remedy was found appropriate confirms the Court's decision that the requested relief must be denied. The Court in *Berry* v. *School District*, 698 F.2d 813 (6th Cir.) *cert. denied* 104 S.Ct. 235 (1983), *Evans* v. *Buchanan*, 393 F.Supp. 428 (D. Del. 1975), *aff'd mem.*, 423 U.S. 963 (1975), and *Newburg Area Council* v. *Board of Education*, 510 F.2d 1358 (6th Cir. 1974) *cert. denied*, 421 U.S. 931 (1975) all found the local districts were not autonomous (unlike in Missouri). Here, the SSDs do not ignore their district lines although they do cooperate with other

locally autonomous districts to provide educational opportunities for their students. (*See, e.g.*, "Special Education" and "Vocational Education" sections *supra*).

As discussed earlier, plaintiffs' reliance on the older Eighth Circuit cases of *Morrilton*, *Kinloch*, and *Haney* is misplaced because those cases involve racial gerrymandering of school district lines, an issue absent here. Likewise, plaintiffs' reliance on the Indianapolis and Pennsylvania cases is inappropriate because there, state legislation having obvious multidistrict racial effect was found as the basis for interdistrict relief. *See, United States* v. *Board of School Commissioners*, 637 F.2d 1101 (7th Cir.) *cert. denied* 449 U.S. 838 (1980) and *Hoots* v. *Pennsylvania*, 672 F.2d 1107 (3rd Cir.) *cert. denied*, 103 S.Ct. 55 (1982).

Recent cases applying the interdistrict standards of *Milliken* have summarily rejected all-encompassing allegations unsupported by evidence of significant interdistrict violations. *See, e.g., Bronson* v. *Board of Education*, 578 F.Supp. 1091 (S.D. Ohio 1984), *Goldsboro City Board of Education* v. *Wayne County Board of Education*, No. 81-43-CV-8 (E.D.N.C. June 10, 1983), and *Armour* v. *Nix*, No. 16708 (N.D. Ga. Sept. 24, 1979) *aff'd mem.*, 446 U.S. 930 (1980). The similarity between plaintiffs' theories and evidence in those cases and the case at bar confirms the Court's conclusions herein. Even if the Court were to view plaintiffs' evidence liberally, which under Rule 41(b) it is not required to do, the violations proved are at most, *de minimus* and far removed in time. Therefore, interdistrict relief must be denied and the Rule 41(b) motions of the SSDs granted.

Accordingly, it is hereby

ORDERED that the Rule 41(b) motions filed by the following school districts and their superintendents are granted: Blue Springs Reorganized School District R-IV,

Center School District No. 58, Fort Osage Reorganized School District R-1, Grandview Consolidated School District No. 4, Hickman Mills School District, Independence School District, Lee's Summit Reorganized School District R-VII, Liberty School District, North Kansas City School District, Park Hill Reorganized School District No. 5, and the Raytown Consolidated School District No. 2.

/s/ Russell G. Clark
RUSSELL G. CLARK
Chief Judge
United States District Court

Dated: June 5, 1984

Supreme Court, U.S.
FILED
NOV 8 1994
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No. 93-1823

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTIONS PRESENTED

1. Whether a remedial desegregation program must remain in effect in an urban school district because student achievement throughout the school district, as measured by results on standardized test scores, has not risen to some unspecified level designed to achieve comparability to the results in surrounding suburban school districts.

2. Whether the courts below erred in implementing an interdistrict remedy in an intradistrict case by ordering salary increases for all employees of the school district for the purpose of increasing the desegregative attractiveness of the school district.

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BRIEF OF PETITIONERS

OPINIONS BELOW

The November 29, 1993, opinion of the court of appeals (Pet. App. A-1-27) is reported at 11 F.3d 755. The December 8, 1993, opinion of the court of appeals (Pet. App. A-28-35) is reported at 13 F.3d 1170. The order of February 24, 1994, denying rehearing (Pet. App. A-36-42) and the order of March 15, 1994, denying rehearing *en banc* (Pet. App. A-43-68) are reported at 19 F.3d 393. The district court's orders (Pet. App. A-69-121) of June 17, 1992, June 25, 1992, June 30, 1993, and July 30, 1993, are not reported.

JURISDICTION

The opinion of the court of appeals was entered on November 29, 1993. Pet. App. A-1-27. Rehearing was denied on February 24, 1994. Pet. App. A-36-42. The petition for a writ of certiorari was filed on May 16, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in relevant part that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

This controversy arises out of the long-running Kansas City, Missouri, *intra*district school desegregation case, in which Missouri taxpayers have been obligated by court orders to expend more than $1.3 billion to fund a massive remedial program with overriding *inter*district features. Since the inception of the unprecedented remedy in the 1985-86 school year, these court-ordered "desegregation" expenses—borne largely by petitioner, the State of Missouri—have grown at an astounding rate: annual expenditures in fiscal year 1986 were $18 million; by fiscal year 1993, those annual costs had risen to $206 million. As it has grown, the remedial program has assumed all the appearances of an interdistrict remedy, despite the district court's express finding that there has been no interdistrict violation. At bottom, this extraordinarily expansive exercise of judicial remedial authority has far outstripped the scope of the constitutional violation on which it is based.

A. The Liability Findings.

1. In 1977, the Kansas City, Missouri, School District (the "KCMSD" or the "district") and certain KCMSD students, who were all children of KCMSD Board of Education members, filed suit against the State of Missouri, its Board of Education, various state officials, and twelve Missouri suburban school districts, claiming that defendants were responsible for unconstitutional *inter*district segregation throughout the metropolitan area.

At about the same time, the KCMSD initiated its own comprehensive intradistrict student reassignment plan, known as the "6-C Plan." Under the 6-C Plan, which remained fully in effect until the implementation of the court-ordered plan, the district pursued a number of desegregative measures: it changed boundary lines; paired and clustered elementary schools; created enlarged secondary attendance zones to allow two-way reassignments; and implemented non-contiguous zoning.[1] According to the KCMSD, the goal of the 6-C Plan was "a minimum of 30% minority enrollment . . . in every KCMSD school." *Jenkins* v. *Missouri*, 639 F. Supp. 19, 35 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987) ("*Jenkins II*"). As a result of its implementation of the 6-C Plan, the KCMSD changed more than 16,000 KCMSD students' school assignments and attained the 30% goal, despite the fact that, during the Plan's implementation, white enrollment in the KCMSD decreased by 44%. Largely as a result of these and other desegregation efforts, in 1979, the Office of Civil Rights of the United States Department of Health, Education and Welfare certified the KCMSD's compliance with federal school desegregation requirements under Title VI of the 1964 Civil Rights Act. *Id.* at 36.

---

[1] This intradistrict desegregation plan was strikingly similar to those used effectively in creating unitary districts throughout the South. *See, e.g., Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992).

In May 1979, the plaintiffs filed an amended complaint against the KCMSD [2] and the federal and state defendants named in the original complaint, adding a claim of an intradistrict violation. The KCMSD filed a cross-claim against the State, "reiterating the allegation of interdistrict violation" made in the original complaint, and also seeking indemnification from the State for any intradistrict liability. *Jenkins II*, 807 F.2d 657, 661 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987).

2. Following an extended trial, the district court rejected in their entirety the claims for *inter*district relief. See Order of June 5, 1984, J.A. A-731-32; see also *Jenkins II*, 807 F.2d at 662 (district court found "that none of the allegedly discriminatory actions committed by the state or federal defendants had caused any significant current interdistrict segregation"). In addition, the court found a "[l]ack of proof of discriminatory intent in the establishment or changing of any school district boundary lines." Order of June 5, 1984, J.A. A-726.

The district court specifically addressed the issue of "white flight" from the KCMSD.[3] It found no evidence

[2] Shortly after the filing of the original complaint, the district court had realigned the KCMSD as a defendant. *School District* v. *Missouri*, 460 F. Supp. 421, 442 (W.D. Mo. 1978). Even after this realignment, the student plaintiffs and the KCMSD might well be seen as parties that have "joined forces apparently for the purpose of extracting funds from the state treasury," *Missouri* v. *Jenkins*, 495 U.S. 33, 76 (1990) (Kennedy, J., concurring in judgment and concurring in part) (internal quotations omitted). The position taken by the KCMSD in this Court clearly illustrates Justice Kennedy's point.

[3] Enrollment in the KCMSD was majority white until 1970. *Jenkins* v. *Missouri*, 593 F. Supp. 1485, 1492 (W.D. Mo. 1984) ("*Jenkins I*"). As total enrollment in the KCMSD declined by more than 50% from the 1967-68 school year to the 1983-84 school year, white enrollment declined at a greater rate than black enrollment. *Id.* at 1495 (from 1958 to 1983, white enrollment decreased by 80 percent; from 1971 to 1983, black enrollment decreased by 30 percent). In the 1983-84 school year, the total enrollment was 68 percent black. These demographics suggest that "white flight" was the result of desegregation—not segregation.

"that any school official of the [suburban school districts] acted to lure white families or to discourage black families from moving into their districts." *Id.*, J.A. A-753; see also *id.*, J.A. A-754 ("none of the [suburban school district defendants] did or failed to do anything which has any significant effect on residential patterns in the Kansas City [metropolitan area]"). In addition, with respect to the state and federal defendants, the district court opinion "effectively foreclose[d] findings of interdistrict effect . . . flowing from [any] constitutional violations with respect to housing that may have occurred in KCMSD." *Jenkins II*, 807 F.2d at 677.[4] The Eighth Circuit affirmed the district court's conclusion that there was no interdistrict liability on the part of the State or any other defendant. *Id.* at 671.

3. Subsequently, the district court held the KCMSD and the State liable for an *intra*district violation within the KCMSD. *Jenkins* v. *Missouri*, 593 F. Supp. 1485, 1492 (W.D. Mo. 1984) ("*Jenkins I*"). Although the KCMSD had eliminated all entirely white schools in 1977 and by 1984 had reduced significantly the number of schools with a high concentration of minority students, *id.* at 1493, the district court found that "the District did not and has not entirely dismantled the dual school system" because "[v]estiges of that dual system still remain." *Id.*[5] The *sole* vestige that the district court identified in

[4] In fact, the district court found no evidence of conduct by the State, with respect to housing or otherwise, that would support interdistrict liability. *Jenkins* v. *Missouri*, 807 F.2d 657, 672 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987) ("*Jenkins II*"); *see id.* at 677 n.26 ("[t]here simply is no evidence in the record in this case that official housing discrimination caused school segregation").

[5] The KCMSD had stipulated that it had not achieved unitary status prior to 1977. *Jenkins I*, 593 F. Supp. at 1489.

the liability order was the KCMSD's maintenance of 24 "racially isolated" schools. *Id.*

With respect to the State's liability, the district court again rejected plaintiffs' claims that Missouri had fostered residential segregation. *Id.* at 1502-03. Specifically, it found no constitutional violation in the operation of the Missouri Housing Development Commission or any "evidence whatsoever that the state agencies exercised coercive power or significantly encouraged [private discrimination]" in the areas of real estate, financing, insurance, and public accommodations. *Id.* at 1503. The court also concluded that there was "nothing in the [State's] location of the highways nor in the operation of [the Missouri Department of Highway and Transportation's] relocation program which amounted to a constitutional violation" for which the State of Missouri would be liable. *Id.* at 1502.[6]

The district court had already made clear that school districts in Missouri "are more autonomous than those discussed in *Milliken* and numerous other desegregation cases." Order of June 5, 1984, J.A. A-727; see *id.*, J.A. A-730-31 (Missouri school districts are governed by local boards of education responsible for all aspects of operations). In particular, "[e]stablishment of school district boundaries is a local matter in Missouri, and . . . each of the boundaries of the school districts" in the Kansas City metropolitan area was "established through local initiatives, with no taint of any racial animus." *Id.*, J.A. A-729.[7] Similarly, with respect to the issue of interdistrict

[6] The district court also found that the State had undertaken substantial efforts to assist formerly segregated districts, including the provision of financial aid. 593 F. Supp. at 1495.

[7] The only state role in the establishment of school districts involved a modification in 1909 of a state law governing the point at which a city's population growth would require the creation of a single city-wide school district. Order of June 5, 1984, J.A. A-746. The State increased this ceiling from 300,000 to 500,000,

transfers, the district court found that the question of "whether to educate their black students, if any, at schools within the district or to transfer them to schools in another district" was "solely a matter of local control and within the discretion of the local school district." *Id.*, J.A. A-731, 735.

In sum, the State's liability—as opposed to the KCMSD's liability—for any "vestiges" of *de jure* intradistrict segregation was premised almost exclusively on the existence of the pre-1954 *de jure* dual school system. *Jenkins I*, 593 F. Supp. at 1500-05. Nevertheless, the district court concluded that the State was liable, along with the KCMSD, for the remaining "vestiges" of *de jure* segregation because "the State as a collective entity cannot defend its failure to affirmatively act to eliminate the structure and effects of its past dual system." *Id.* at 1505.[8]

B. The Remedial Orders.

1. The court ordered the parties to submit remedial plans. *Id.* at 1506. The KCMSD's initial plan proposed consolidation of the KCMSD with the suburban school

but there was "no evidence" that the change was made "for racial reasons." *Id.*

[8] The State conceded that the Missouri constitution and statutes had required segregated schools before 1954. *Jenkins I*, 593 F. Supp. at 1490. However, the statutes enforcing that shameful episode of the State's history had been repealed by 1957, and shortly after *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*"Brown I"*), the Missouri Attorney General declared the constitutional provision and statutes void and unenforceable. Although the state constitutional provision was not formally excised until 1976, the district court did not find any State-imposed impediment to desegregation after 1954. *Jenkins I*, 593 F. Supp. at 1504-05.

The State did not appeal the decision that it, together with the KCMSD, was liable for the intradistrict violation, and that holding is not challenged here. The Eighth Circuit upheld the denial of interdistrict liability. *Jenkins II*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987).

districts that had previously been dismissed, forming one massive metropolitan school district. See KCMSD Plan, Doc. No. 1046, at 9-14 (Jan. 18, 1985). However, because the district court had found no interdistrict violation, it rejected this plan and required the KCMSD to prepare an amended plan "to be implemented within the existing boundaries" of the KCMSD. Order of Jan. 25, 1985, at 3.

On June 14, 1985, the district court issued its original remedial order. *Jenkins II*, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). Despite the fact that the court previously had identified certain racially "isolated" schools as the only vestige of *de jure* segregation within the KCMSD, the court nevertheless held that a principal goal of the remedial order would be to "improve the educational quality" of the KCMSD. *Id.* at 24. The court rationalized this expansion of remedial authority by making a finding that "[s]egregation has caused a system wide reduction in student achievement in the schools of the KCMSD." *Id.* (emphasis deleted).

The district court, however, came to this conclusion about the effect of *de jure* segregation in the KCMSD without making any specific findings about the extent to which student achievement (on the part of minority or non-minority students) had been "reduced" or the extent to which such "reduction" was attributable to segregation, as opposed to other factors. The district court similarly made no effort to reconcile its conclusion with the fact that a substantial number of students within the KCMSD were not minority students and hence had suffered no constitutional injury. Finally, the district court made no findings concerning the particular level of student achievement that would have to be reached to remedy this supposed "vestige."

2. The remedial order ordained—and required the State to fund—a panoply of new programs designed to

ensure "quality education." First, the district court ordered that the KCMSD be restored to a AAA classification, the highest classification for school districts awarded by the State Board of Education at that time. To achieve this system-wide objective, the court directed the hiring of 22 additional librarians, 54 additional teachers in the areas of art, music, and physical education, and additional teacher aides and counselors, as well as the acquisition of additional library and media resources.

Second, the district court ordered a district-wide reduction in class size in order to obtain a teacher-to-student ratio below the level needed for AAA standing. Initially, this resulted in the hiring of 183 additional teachers. Third, the district court ordered implementation of a variety of new programs to expand educational opportunities for KCMSD students. These included Full-Day Kindergarten; expanded summer school programs; a before- and after-school tutoring program (now called the Extended Day program); and an early childhood development program. *Jenkins II*, 639 F. Supp. at 30-33. The district court also ordered a system-wide "Effective Schools" cash grants program with a stated goal of improving students' standardized test scores. *Id.* at 34. The Effective Schools program has required the expenditure of more than $51 million through the 1993-94 school year. Missouri Dep't of Elementary and Secondary Educ., *KCMSD Total Desegregation Program Expenditures* (Sept. 30, 1994) ("*Desegregation Expenditures*").[9]

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[9] The vast majority of these educational programs—referred to as the "quality education" programs—have continued with minor modifications to the present day. *See* Orders of June 16, 1986 (J.A. A-102-24); July 6, 1987 (*id.* A-194-211); July 25, 1988 (*id.* A-245-76); July 5, 1989 (*id.* A-277-310); Apr. 23, 1990 (*id.* A-311-16); June 26, 1990 (*id.* A-323-31); July 5, 1991 (*id.* A-354-74); June 17, 1992 (*id.* A-69-75); and July 30, 1993 (*id.* A-110-21). These programs go far beyond the scope of the remedial measures identified in *Milliken* v. *Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"), because they are not targeted at providing educational opportunities to minority students who were directly disadvantaged by

Taken together, the "quality education" programs, which began in the 1985-86 school year, now cost Missouri taxpayers approximately $54 million in a typical year. To date, the cost of implementing the quality education programs alone amounts to more than $220 million. There has never been any suggestion in the decade since these remedies were imposed that the State has done anything other than comply fully with the district court's decrees by funding the ordered amounts.

3. The original quality education programs constituted only the beginning of the vast and comprehensive remedy ordered by the district court and affirmed by the dedicated panel of the Eighth Circuit, a remedy that has expanded at the urging of the student plaintiffs and the KCMSD. In addition to the quality education programs, the district court imposed a sweeping multi-theme magnet schools plan, under which *every* senior high school, *every* middle school, and approximately two-thirds of the elementary schools were converted into magnet schools aimed at providing "a greater educational opportunity to *all* KCMSD students." Order of Nov. 12, 1986, J.A. A-131.

These magnet schools include a $32 million dual-theme high school for computer and classical Greek education, containing, *inter alia*, massive computer resources, a field house with an indoor track, basketball and handball courts, a dedicated gymnastics and wrestling room, a weight-training room, and an Olympic-size swimming pool in a 400-seat natatorium, Mot. for Approval of Long-Range Capital Improvement Plan with Mem. by KCMSD, Doc. No. 1271 (Feb. 26, 1987); an agricultural school, including a working farm area, live farm animals, and a greenhouse, *id.*; a technical vocational school offering extensive technological programs such as laser technology, optics, and robotics, Mot. for Approval of Long-

de jure segregation. Instead, the "quality education" programs in this case are designed to improve academic performance across the board for all KCMSD students.

Range Magnet School Plan, Doc. No. 1211 (Aug. 13, 1986) ("Doc. No. 1211"); and an aquaculture facility. Desegregation Monitoring Comm. Rep. (Sept. 20, 1994). Many of the programs include field trips across the United States and to foreign countries, all of which are completely paid for by court-ordered desegregation funding. Doc. No. 1211, *supra*. To date, the magnet programs have cost $317 million, and magnet transportation has added to that figure an additional $131.7 million. *Desegregation Expenditures, supra* p. 9.[10]

The district court found that the deterioration in the physical plant of certain KCMSD facilities "[u]nquestionably" was due to "deferred maintenance by the KCMSD." *Jenkins* v. *Missouri*, 672 F. Supp. 400, 403 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988) ("*Jenkins III*"). The court concluded, however, that the failure of the State "to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere" that encouraged such conduct by the KCMSD. *Jenkins III*, 672 F. Supp. at 403. The court therefore imposed upon the State a sweeping capital improvements plan designed to achieve "suburban comparability" in KCMSD facilities. *Id.* at 404; see also *Missouri* v. *Jenkins*, 495 U.S. 33, 77, 80 (1990) (Kennedy, J., concurring in part and concurring in judgment) (outlining contours of the "extraordinary" remedy ordered by the district court); *Jenkins III*, 855 F.2d 1295 (8th Cir. 1988); *Jenkins* v. *Missouri*, 931 F.2d 470, 481 (8th Cir.), *cert. denied*, 112 S. Ct. 437 (1991) ("*Jenkins IV*"). This imposition of liability demonstrated the court's previously announced conviction that the "argument that

[10] Presently before the district court is a proposal to have the State fund a study for a further expansion of the magnet program that would establish high school programs in area community colleges, with attendance open to both KCMSD and suburban students. J.A. A-713-19. Because the proposed program is being mischaracterized as a "voluntary" interdistrict transfer plan, the State would be required fully to fund this as well. *See infra* p. 14 & note 13.

the present condition of the facilities [in the KCMSD] is not traceable to unlawful segregation is irrelevant." *Jenkins II*, 639 F. Supp. 19, 40 (W.D. Mo. 1985). As of 1990, over $260 million in capital improvements had been ordered. *Missouri* v. *Jenkins*, 495 U.S. at 61. The total ordered for these improvements has now risen to approximately $544 million, and more requests are forthcoming. See KCMSD First Report to the Ct. on Status of Magnet, Capital and Fin. Planning at 11 (Sept. 15, 1994).

In approving the second-year budget for the "quality education" programs and the magnet schools, the district court stated that its "long term goal . . . is to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." Order of June 16, 1986, J.A. A-118-19. This expressed goal of "suburban comparability" is intended not only to "restore[]" the position of "victims of unconstitutional segregation," but also to "establish[] an environment designed to maintain and attract non-minority enrollment." *Id.*, J.A. A-119. For example, the district court stated that its purpose in imposing the lavish magnet school program was to make the KCMSD so attractive to "non-minority students from the suburbs" that they would be "draw[n] in" to the KCMSD. Order of Nov. 12, 1986, J.A. A-132. The court also "believe[d] that the proposed magnet plan is so attractive that it would draw non-minority students from the private schools who have abandoned or avoided the KCMSD." *Id.* Not surprisingly, the district court recently concluded that its enormously expensive court-ordered "quality education" program "provide[d] the KCMSD with facilities and opportunities *not available anywhere else in the country.*" Pet. App. A-115 (emphasis added).

4. In addition to the facilities, resources, and capital expenditures noted above, the district court also has required extraordinary salary assistance to KCMSD em-

ployees. See, *e.g.*, *Jenkins III*, 672 F. Supp. at 410 (ordering over $7 million for additional teachers and salary increases over the next five years). Both the salary increases ordered by the courts and the types of employees receiving court-ordered increases have expanded during the course of implementation of the remedy. Initially, the KCMSD requested salary relief solely for teachers on the ground that the district's "salary position . . . has deteriorated significantly in recent years, since KCMSD has not been able to obtain passage of a tax levy to fund raises." Motion for Further Funding Relief, Doc. No. 1326 (May 8, 1987); see Attachment 1 to Mot., Decl. of Roger N. Gaunt ¶ 38.

In 1990, however, the student plaintiffs and the KCMSD—together with an intervenor, the American Federation of Teachers, Local 691—proposed further expansion of salary funding to cover salary increases to non-instructional personnel. The State contested each of these proposals because the salary increases were not desegregation-related and the purpose of the requests was to subvert the normal bargaining process, substituting the court as the decision-maker. After several days of hearings, but before the State had presented its case, the district court made clear that it favored the movants' salary increase proposals. See Trial Tr., June 20, 1990, at 659-61.[11]

Recognizing the clear import of the court's message, the State agreed to a compromise for a two-year period, which the district court approved. Order of July 23, 1990, J.A. A-332-37. In 1992, at another joint request of the KCMSD and the union, the district court again

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[11] One of the traditional *Green* factors in implementing an intra-district remedy is the racial composition of faculty and staff. *Green* v. *County Sch. Bd.*, 391 U.S. 430, 436 (1968). Symptomatic of the district court's misdirected focus on "quality"—as opposed to equality—is a lack of any finding that these extraordinary salary increases improve racial balance in the hiring and retention of faculty and staff in the KCMSD.

extended and increased its salary orders. The court explicitly grounded these extraordinary salary increases on its "desegregative attractiveness" rationale. Pet. App. A-90.

In 1993, the plaintiffs, the KCMSD, and the union sought to expand salary funding even further. Once again, the district court approved these requests over the same objections by the State, stating that KCMSD salaries should be competitive with the "national urban market." *Id.* A-96-97. Currently, all but three of the approximately 5,000 KCMSD employees have received increased salaries from court-ordered desegregation funds. The total cost of the salary component of the remedy since 1987 is $201 million. *Desegregation Expenditures, supra* p. 9.

5. Although the violation underlying the KCMSD remedial orders is solely *intra*district in scope, the district court's remedial orders from the outset have embraced a broader purpose: to promote *inter*district integration. The district court—with the consistent encouragement of the dedicated Eighth Circuit panel—repeatedly has required the State to propose State-funded interdistrict transfer plans and to inquire into the willingness of suburban districts to accept KCMSD students. See Orders of June 14, 1985, J.A. A-86-88; June 16, 1986, J.A. A-112-14.[12] See also Order of May 14, 1990, J.A. A-317-22.[13]

[12] The district court has warned the State that if it does not "demonstrate that [it is] seriously committed to seeking the cooperation of each suburban school district in the Kansas City, Missouri metropolitan area," "this Court will seek other methods of accomplishing this task at the State's expense." Order of June 16, 1986, J.A. A-114. In 1992, the Eighth Circuit panel suggested that implementation of a large scale, State-funded, "voluntary" interdistrict transfer plan is an essential precondition to unitary status. *Jenkins* v. *Missouri*, 981 F.2d 1009, 1016 (8th Cir. 1992) ("*Jenkins V*").

[13] At one point, the court of appeals stated that "a voluntary interdistrict program is one that has great potential for improving the racial balance *in the Kansas City area.*" *Jenkins II*, 807 F.2d 657, 683 n.30 (8th Cir. 1986) (emphasis added), *cert. denied*, 484 U.S. 816 (1987). That court further opined that the suburban districts—which already had been dismissed from the litigation—could be found in violation of the Fourteenth Amendment for not agreeing to participate in a "voluntary" plan. *Id.*

Most recently, the Eighth Circuit panel, in affirming the rejection of a "voluntary" plan contrived by plaintiffs and the beneficiary school district—at an initial cost to the State of $14,000 per student—stated "more must be done either by way of further inducements to the suburban districts, or in more coercive actions that the State is empowered to take." *Jenkins* v. *Missouri*, No. 94-1405, slip op. at 15 (8th Cir. Oct. 13, 1994) ("*Jenkins VI*"). The panel made clear that a lack of demonstrated results from a "voluntary" interdistrict transfer plan could subject the State to more "coercive remedial measures." *Id.*

C. The Decisions Under Review.

1. Following this Court's decisions in *Board of Education* v. *Dowell*, 498 U.S. 237 (1991), and *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992), the State of Missouri sought a declaration of partial unitary status with regard to the "quality education" programs. The State maintained that, as to those programs, it had satisfied the district court's "suburban comparability" standard. The State demonstrated that measures taken by the KCMSD and the State had provided programs that met, and in many cases exceeded, the educational opportunities "available in all of the suburban school districts in almost every area of classification" examined by the Missouri Department of Elementary and Secondary Education. J.A. A-452 (testimony of Dr. Terrance Stewart).

Despite the State's uncontroverted evidence and the district court's later finding that its "suburban comparability" standard had been surpassed, Pet. App. A-115, the district court, without comment or findings, implicitly re-

jected the State's request for partial unitary status by ordering continued funding of the programs. *Id.* A-69.

2. Notwithstanding the acknowledged lack of factual findings to support the district court's order, the dedicated Eighth Circuit panel affirmed. In so doing, the panel held that unitary status in the area of quality education could not be measured solely by the "implementation of programs" providing equal opportunity. *Id.* A-20-21. The court went further, indicating that the test for unitary status would be some unspecified improvement in KCMSD student achievement. The panel stated:

> The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation. It will take time to remedy the system-wide reduction in student achievement in the KCMSD schools . . . .

Id. According to the panel, such a "student achievement" standard was required by the "goals of the remedial programs," which were:

> to improve the educational lot of the victims of unconstitutional segregation, to regain some portion of the white students who have fled the District and retain those that are still there, and to redistribute the students within the KCMSD to achieve the maximum desegregation possible.

Id. A-24 (citing *Jenkins III*, 855 F.2d 1295, 1302 (8th Cir. 1988)).

The dedicated panel also upheld the order granting across-the-board salary increases to virtually all KCMSD employees. *Id.* A-35. These court-ordered salary increases covered not only teachers and administrators, but also non-instructional employees such as cooks, custodians, and clerical workers.[14]

[14] The dedicated panel affirmed the 1992 salary order in its opinion of November 29, 1993, Pet. App. A-1-27, and the 1993 order in its separate opinion of December 8, 1993. *Id.* A-28.

3. In an opinion concurring in the Eighth Circuit's 6-5 decision to deny rehearing *en banc*, Senior Circuit Judge John Gibson and Judge McMillian, both members of the dedicated panel, affirmed that test scores would be used to measure success in "student achievement": "When we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered." *Id.* A-48. The concurring opinion stated that test scores would be only one "factor in the equation" in determining partial unitary status. *Id.* The nature and identity of the other "factors" were, however, left unspecified.

In fact, as five members of the court dissenting from the denial of rehearing *en banc* pointed out, improvement in standardized test scores was the *only factor* lacking in the implementation of the quality education program:

> The only factor the District Court saw standing in the way of unitary status for the educational program was continued below-average academic performance. Indeed, there is no other evidence in the record to support a conclusion that the educational enhancement . . . program of the KCMSD is wanting.

Id. A-61 (internal citations omitted).[15] According to the dissent, by "imbedd[ing] a student achievement goal

[15] The dissent noted, for example, that per-pupil costs in the KCMSD were more than double those in some of the suburban school districts. Pet. App. A-56 (KCMSD per-pupil costs were $9,412 per pupil, excluding capital costs, or $13,500 per student, including capital costs; the comparable figures for the suburban districts were $2,854 to $5,956 per pupil, excluding capital costs, or $4,192 to $7,488 per pupil, including capital costs). The dissent also noted the State's prompt compliance with the district court's specific orders: "In every instance, the enhancement of resources and program improvements ordered by the district court had been implemented and were in place no later than the 1988-1989 school year. Most of them predated that school year." *Id.* A-61. Even the KCMSD's Superintendent agreed that the necessary "quality education" resources were in place and that the only hurdle to

measured by annual standardized tests into its test of whether the KCMSD has built a high quality educational system," the court had "create[d] a hurdle to the withdrawal of judicial intervention from public education that has no support in the law." *Id.* A-58. The five dissenting judges also held that salary increases for non-instructional personnel were beyond the scope of any legitimate remedial goal. *Id.* A-57.

4. Prior to the grant of *certiorari* by this Court, the district court again rejected the State's argument that it was entitled to a declaration of unitary status with respect to the quality education programs. *Id.* A-110-21 (approving "quality education" budget requests for 1993-94 and 1994-95 school years). In affirming the district court's order, the dedicated panel once again expanded the scope of the remedy, holding that unitary status for the "quality education" component of the plan would not be granted until the State could demonstrate a plan to provide *permanent* funding for such programs. J.A. A-578-88.

SUMMARY OF ARGUMENT

I. This case poses two specific remedial questions. First, does a federal court in an intradistrict desegregation case have remedial authority to require district-wide improvement in student achievement—as measured by national averages or other standards—before that district can be declared unitary. Second, does a federal court in such a case have remedial authority to order across-the-board salary increases for all school district employees, even if there is no evidence that such salary increases reasonably promote desegregation within the school system.

A. Although each question can be dealt with on its own terms, both are inextricably connected to the more funda-

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unitary status was that KCMSD students reach the "national norm, the 50th percentile" in achievement on standardized tests. *Id.* A-62 (quoting testimony).

mental issue of the propriety of the ultimate remedial purpose of the Kansas City desegregation decree, decades after the end of *de jure* segregation. The principles that govern here are well settled. The object of remedial orders in the school desegregation context is the elimination of unconstitutional *de jure* school systems. *Milliken* v. *Bradley*, 418 U.S. 717, 737 (1974) ("*Milliken I*"). Desegregation remedies must be focused on those conditions or aspects of school operations that offend the Constitution; thus, any remedy directed to a condition that does not violate the Constitution or does not flow from such a violation exceeds appropriate limits. *Milliken* v. *Bradley*, 433 U.S. 267, 282 (1977) ("*Milliken II*"); *Pasadena Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 434 (1976); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971). Such limits are "tied to the necessity of establishing that school authorities have in some manner caused" the unconstitutional condition that is the subject of the court's remedial order. *Spangler*, 427 U.S. at 434.

In the course of this protracted litigation, the courts below have lost sight of the goal of eliminating one-race schools, instead converting the remedial phase of this case into an exercise in providing the best (and most expensive) school system that the State's money can purchase. There is no question that increases in the "quality" of education in the Kansas City schools theoretically *could* promote integration, in the sense that superior quality schools might further the goal of attracting additional non-minority students from the suburbs or private academies. But that goal is inherently *inter*district in nature, and this case is, and always has been, an *intra*district case. This fundamental departure from legitimate remedial goals has caused the lower courts to pursue a course that is inherently misguided and in excess of any appropriate measure of their remedial authority.

B. The best indication that this case has strayed off the proper remedial course is the complete absence of any

meaningful discussion in the decisions below of the relevant criteria for determining whether the Kansas City school system has become unitary. In a typical intra-district case, see, *e.g.*, *Freeman* v. *Pitts,* 112 S. Ct. 1430 (1992), the remedial analysis focuses on the so-called "*Green* factors," *Green* v. *County Sch. Bd.*, 391 U.S. 430 (1968), which this Court has identified as the measure of whether a school district has racially identifiable schools. If schools within a district are as racially indistinct as practicable; if the schools' faculties and staffs are similarly diverse; and if the schools both have similar physical appearances and offer similar means of transportation and equal availability of extracurricular activities, then under this Court's decisions, the school district will be held to have eliminated the vestiges of its prior *de jure* system. As soon as those objectives have been achieved as far as practicable, and the government officials involved have demonstrated a commitment to fulfilling their constitutional obligations, then federal court supervision must be terminated. *Board of Educ.* v. *Dowell,* 498 U.S. 237, 248-49 (1991).

The well settled approach of *Green* makes no provision for comparing overall "student achievement" standards within the KCMSD to some national (or even suburban) standard or to some unstated level of improvement. Similarly, there is no basis for comparing staff salary levels in the KCMSD to suburban, regional, or national norms. Instead, under the traditional *Green* factors, the remedial goal is focused on the elimination of racially identifiable schools to achieve *equality* within the district, not an effort to improve *quality* measured against standards derived either inside or outside the district. See *Freeman,* 112 S. Ct. 1430; *Dowell,* 498 U.S. 237; *Spangler,* 427 U.S. 424; *Green,* 391 U.S. 430.

C. The courts below have employed two flawed rationales—both of which arise out of mistaken assumptions about what constitute "vestiges" of *de jure* segregation—

to escape the constraints of the *Green* factors and vastly expand their remedial efforts. First, the district court augmented its original liability findings to include a "finding" that "white flight" was a vestige of *de jure* segregation. Because the court lacked authority to order inter-district transfers, it adopted the novel approach of making the school system so attractive that non-minority students would be drawn from the suburban and private schools. Such a faculty rationale could, however, justify *any* action—including mandated improvement in test scores or across-the-board salary increases—that might be said to improve the school district. To be sure, to the extent such efforts make a school district more attractive to white students, they could thereby promote integration. But they exceed by far what is proper to remedy the constitutional violation.

Second, the court held that *overall* student achievement was harmed by *de jure* segregation. Based on this assumption—itself not supported by the record—the court concluded that it could order remedies designed to upgrade achievement system-wide. The court made no findings tying its decision to the existence of racially identifiable schools. Under such a rationale, the court clearly would deny unitary status solely because achievement test scores for black *and* white students remained below suburban or national norms or some other unspecified level of achievement.

The flaw common to both of these arguments is that the conditions in question simply are not vestiges of the former constitutional violation. "White flight" to the suburbs is not a vestige of *de jure* segregation. To the contrary, "white flight" is a regrettable consequence of desegregation, and the record and findings in this case—like the record in many other jurisdictions around the country—make clear that the departure of non-minority students did not occur until the KCMSD began to dismantle *de jure* segregation.

Similarly, although at one point in time, *de jure* segregation deprived minority and non-minority students of the cultural richness of a diverse educational environment, the district court failed to find a causal link between that segregation and current system-wide achievement levels, especially in light of the many external factors that affect achievement. There is certainly no reason to conclude that *de jure* segregation of decades ago is the cause of "reduced" test scores by *non*-minority students today. Even though school systems can be required to provide special remedial programs (*e.g.*, "quality education") to students directly harmed by racial segregation, *Milliken II*, 433 U.S. 267 (1977), such authority cannot be expanded into a federal judicial mandate to "provide the KCMSD with facilities and opportunities not available anywhere else in the country." Pet. App. A-115.

II. Even if "suburban comparability" in test scores and "desegregative attractiveness" were legitimate remedial goals, the courts below exceeded the proper scope of their remedial authority by mandating a particular measure of educational success or outcome; the only legitimate goal is equal educational opportunity. It simply is beyond the scope of the constitutional authority of the courts below to erect actual achievement as the benchmark of a successful remedial program. It is also beyond the scope of those courts' authority to require across-the-board salary increases in the absence of any showing of a link between such increases and the courts' flawed rationale of "desegregative attractiveness."

The lower courts' expansive intrusions into the management of a local school district thus are constitutionally unauthorized, and they are detrimental to the independence of a State and its school districts in our federal system. This Court should make clear that the *Green* factors' focus on identifiable and reasonably measurable aspects of the school system itself provides the appropriate test for determining whether the core purpose of the desegregation remedy—removal of the dual school system

and its "inherent" vestiges—has been achieved. Because the orders under review cannot be squared with these fundamental principles, they should be set aside.

ARGUMENT

I. THE COURT-ORDERED SYSTEM-WIDE ACHIEVEMENT REQUIREMENTS AND ACROSS-THE-BOARD SALARY INCREASES CONSTITUTE A REMEDY THAT VASTLY EXCEEDS THE ONLY LEGITIMATE GOAL OF AN INTRADISTRICT DESEGREGATION PLAN: TO UNDO THE VESTIGES OF *DE JURE* SEGREGATION IN THE KANSAS CITY, MISSOURI, SCHOOL DISTRICT.

Despite the undeniable importance of "eliminat[ing] from the public schools all vestiges of state-imposed segregation," the use of federal judicial power to achieve that objective necessarily is constrained by the limits of the Fourteenth Amendment itself. See, *e.g.*, *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 14-15 (1971). Where, as here, remedial orders exceed what is appropriate to remedy a condition actually caused by prior unconstitutional conduct, such orders must be reversed. *Milliken I*, 418 U.S. 717 (1974).

A. Federal Judicial Authority To Remedy Racial Imbalance Is Limited To The Scope Of The Prior Unconstitutional Conduct.

The limits of federal authority to remedy *de jure* segregation in local school systems are defined by the unconstitutional conditions that gave rise to such authority in the first instance. "The target of the *Brown* holding was clear and forthright: the elimination of state-mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils." *Id.* at 737. The sole purpose of a desegregation remedy is to "correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann*, 402 U.S. at 16.

Therefore, in formulating an appropriate remedy, "the nature of the violation determines the scope of the remedy." *Id.*; see *Milliken II*, 433 U.S. 267 (1977). "[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Id.* at 282; see *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 420 (1977) (desegregation remedy must focus on the "incremental segregative effect" of specific constitutional violation); *Pasadena Bd. of Educ.* v. *Spangler*, 427 U.S. 424 (1976); *Milliken I*, 418 U.S. at 736. And the causal link cannot be abstract; the remedy must be tied, in a "realistic sense," to the "injury suffered." *Richmond* v. *J.A. Croson*, 488 U.S. 469, 499 (1989). Thus, in *Milliken I*, 418 U.S. at 752, this Court held that findings of *de jure* segregation within the Detroit school district could not justify an interdistrict remedy mandating racial balance in school assignments that included numerous outlying districts. *Id.* Because the remedy exceeded the extent of the violation, it was found to be in excess of the court's authority under the Fourteenth Amendment. *Id.*

In addition to limits imposed directly by the nature of the violation, as in *Milliken I*, a federal court's authority is constrained by core notions of federalism, including the recognition that "[s]chool authorities have the *primary* responsibility for elucidating, assessing, and solving these problems." *Brown* v. *Board of Educ.*, 349 U.S. 294, 299 (1955) ("*Brown II*") (emphasis added); see *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991). This Court's holdings thus make clear that desegregation decrees are temporary, and that school districts must be returned to the control of state and local authorities as soon as they are operating in compliance with the Constitution. "As [this Court has] long observed, 'local autonomy of school districts is a vital national tradition.'" *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1445 (1992) (quoting *Dayton*, 433 U.S. at 410); see also *Dowell*, 498 U.S.

at 248 (discussing "the important values of local control of public school systems").

Thus, in analyzing the proper scope of a remedial order designed to cure "vestiges" of a dual school system, the lower courts must consider the legitimate "interest of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken II*, 433 U.S. at 280-81; see *Spangler*, 427 U.S. at 436-37 (rejecting plan that would "ensure that the racial mix desired by the court was maintained *in perpetuity*") (emphasis added). In accordance with these principles, this Court has warned against "open-ended" remedies that go beyond the elimination of conditions directly *caused* by *de jure* segregation:

> It is beyond the authority and beyond the practical ability of the federal courts to try to counteract . . . continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated.

Freeman, 112 S. Ct. at 1448. Because demographic shifts in population primarily reflect private decision-making, the remedial order in *Freeman*, which attempted to counteract those shifts, improperly ignored "the necessity of establishing that school authorities have in some manner *caused* unconstitutional segregation." *Spangler*, 427 U.S. at 434 (emphasis added).

In sum, limits imposed by our system of federalism require federal courts to recognize that they are neither authorized nor equipped to perform the uniquely local functions of a school board. The KCMSD remedy, which "uses the quality of education as a lure to attract nonminority students[,] will place the District Court at the center of controversies over educational philosophy that by tradition are left to this Nation's communities." *Missouri* v. *Jenkins*, 495 U.S. 33, 76 (1990) (Kennedy, J. concurring in judgment and concurring in part). State

and local governments cannot optimally perform their function of educating children when every decision is scrutinized exclusively against "a rigid rule erecting race as the sole criterion." *J.A. Croson*, 488 U.S. at 493.[16] As the Fifth Circuit recognized in similar circumstances:

> accommodation of federal superintendence and federalism will not tolerate the idea that although the wrong is righted, the magnitude of the past wrong nonetheless justifies perpetuation of a federal order limiting the ambit of a school district's self-governance.

United States v. *Overton*, 834 F.2d 1171, 1177 (5th Cir. 1987). For these reasons, once *de jure* segregation has been disestablished and its effects have disappeared, courts may not contrive new duties designed to address broader societal goals, with the effect of perpetuating federal control over this essentially local function.

It is by reference to the mandate to eliminate racially identifiable schools that the State's actions must be measured. It is beyond federal authority to require the State of Missouri to remedy conditions in the Kansas City school district that are caused by such factors as private decision-making, local economics, or local demographics. See *Spangler*, 427 U.S. at 435-36. The propriety of the remedial orders in this case should be judged by the controlling principle consistently expounded by this Court that the scope of the remedy is limited by the nature and extent of the constitutional violation. *Milliken I*, 418 U.S. 744.

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[16] The KCMSD, with about 4.3% of the State's students (Missouri Dep't of Elementary and Secondary Educ. Census Report, Oct. 1993), receives 8.46% of all funds distributed through the State's statutory school finance formula (Executive Budget, State of Missouri, Fiscal 1995). Adding current appropriations for court-mandated desegregation remedies raises the KCMSD share to 23%. *Id.* The KCMSD may well seek to retain that share by acceding to continued judicial supervision. *See* Pet. App. A-62 (KCMSD Administrator endorsing a 100-year remedy).

B. The Courts Below Acted Beyond Their Constitutional Authority In Imposing An Interdistrict Remedy To Cure An Intradistrict Violation.

The remedy imposed by the lower courts, which seeks to cure conditions unrelated to past segregation, oversteps the well established purpose of such remedial decrees: to eliminate current effects or conditions "inherent in . . . dual school systems."[17] *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971). A desegregation remedy may *not* "embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." *Id.* at 23. "The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities." *Id.* at 22.

1. There can be no question that this case involves no *inter*district violation. See Order of June 5, 1984, J.A. A-721-820. Plaintiffs' claims for interdistrict relief were rejected due to a "[l]ack of proof of discriminatory intent in the establishment or changing of any school district boundary lines." *Id.*, J.A. A-726. The district court also found the autonomy of Missouri school districts to be a reason to deny interdistrict relief:

> Having reviewed hundreds of minutes from various boards of education in this case, the Court is fully convinced, and hereby finds, that each of the school districts is a locally autonomous and independent

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[17] This Court in 1990 expressly declined either to approve or disapprove the unique scope and purpose of the remedy in this case (although four members of the Court expressed doubt as to whether the "extraordinary" scope and purpose of the remedy were constitutionally required). *Missouri* v. *Jenkins*, 495 U.S. 33, 76-80 (1990). Because the orders at issue are inseparable products of the lower courts' unfounded remedy, the Court is free to examine whether the remedy has now exceeded the "undoubted practical as well as legal limits to the remedial powers of federal courts in school desegregation cases." *Milliken I*, 418 U.S. 717, 736 (1974) (White, J., dissenting).

> entity. Because each defendant district is independent and autonomous from the state of Missouri, and from all other school districts, none has an affirmative duty to merge with other districts. . . . And, absent a finding of interdistrict constitutional violation, none can be made a part of an interdistrict remedy.

Id., J.A. A-731-32. The theory that an interdistrict remedy could be supported by interdistrict "effects" likewise was properly rejected. *Id.*, J.A. A-725. The court of appeals, sitting *en banc*, held these "specific findings . . . negate current significant interdistrict efforts." *Jenkins II*, 807 F.2d 657, 672 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). In short, no evidence in this case would support an interdistrict remedy under the guidelines of *Milliken I*, and the district court correctly refused to grant such relief.[18]

2. Where, as here, the violation at issue is intradistrict in nature, this Court has identified six facets of school operations to guide federal courts in their task of con-

[18] The Eighth Circuit has used *Hills* v. *Gautreaux*, 425 U.S. 284 (1976), to justify the imposition of an interdistrict remedy despite the lack of interdistrict liability. *See Liddell* v. *Missouri*, 731 F.2d 1294 (8th Cir. 1984) (citing *Jenkins II*, 807 F.2d at 682-83). *Gautreaux*, however, does not support the interdistrict features of the remedy here. In *Gautreaux*, the Court considered the scope of a remedy against the United States Department of Housing and Urban Development ("HUD") for discrimination in public housing in Chicago. Although the discrimination occurred in the City of Chicago, the Court found that *Milliken I* did not preclude an order against HUD that would affect its conduct in the surrounding metropolitan area because—unlike the situation in *Milliken I*—HUD had established a black enclave in Chicago; the remedy involved no coercion of uninvolved governmental units; and HUD had plenary authority to act extraterritorially. 425 U.S. at 297-99 & n.14. Here, the district court's findings negate any notion that the State has any significant authority over the local autonomous districts. Moreover, in *Gautreaux*, there was evidence of suburban discrimination and of the "'extra-city impact of [HUD's]' intracity discrimination," *id.* at 284—precisely the opposite of what the district court found here.

torming desegregation remedies to the underlying constitutional violation. See *Green* v. *County Sch. Bd.*, 391 U.S. 430 (1968). These so-called "*Green* factors"—student assignment, faculty, staff, transportation, extracurricular activities, and facilities—bear on the central question of whether any vestiges of the dual school system exist within the district in question. *Id.* at 435. This Court repeatedly has applied these factors and underscored their importance. See, *e.g.*, *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1443 ("*Green* factors are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown*"); *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971) ("existing policy and practice with regard to faculty, staff, transportation, extracurricular activities, and facilities [are] among the most important indicia of a segregated system"); *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 196 (1973); *Board of Educ.* v. *Dowell*, 498 U.S. 237, 250 (1991).

The application of the *Green* factors as a remedial yardstick ensures a close fit between the ongoing remedy and the original constitutional violation. Thus, in *Spangler*, this Court held that where an earlier remedial order had "established a racially neutral system" with respect to the *Green* factor of student assignment, 427 U.S. at 434, the district court "exceeded its authority" in continuing to "require annual readjustment of attendance zones" to maintain racial balance in student assignment. *Id.* at 434-35. The Court disapproved that order because there was no causal link between "a constitutional violation" on the part of defendants and the "judicially order[ed] assignment of students on a racial basis." *Id.* at 434 (quoting *Swann*, 402 U.S. at 28).[19]

[19] Like the courts below, the district court in *Pasadena Board of Education* v. *Spangler* "apparently believed it had authority to impose this requirement [of racial balance in student assignment] even though subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible." 427 U.S. 424, 434 (1976).

In light of the importance of the *Green* factors to this Court's desegregation jurisprudence, their virtual absence from the decisions below is striking. Rather than look to the distribution of resources within the KCMSD—*i.e.*, ascertain whether there are "racially identifiable" schools—the courts below consistently have defined the goals of the remedy in terms of "suburban comparability" and "desegregative attractiveness." See *infra* pp. 32-33. Because, by definition, these "goals" look beyond conditions *within* the KCMSD "assessed in light of the circumstances present and the options available in each instance," *Green*, 391 U.S. at 439, the result is a vastly overreaching remedy.

3. The fundamental flaw in the overall remedial scheme in this case is that, over time, the focus on "desegregative attractiveness" and "suburban comparability" has inexorably led to an interdistrict remedy—notwithstanding the district court's original finding that no interdistrict violation had occurred in the KCMSD.[20] The decisions below, ordering the State to expand its funding of "quality education" improvements in the KCMSD, make apparent that the lower courts have lost sight of the fact that this "school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." *Swann*, 402 U.S. at 15-16. Instead, the courts have created an unprecedented program that attempts "not only [to] remedy the vestiges of past segregation but also [to serve as] a means to attract and retain enrollment from non-minority

[20] For example, the enormous magnet school system was explicitly designed to "magnetize" virtually the entire district in an effort to attract suburban whites. *See* Order of Nov. 12, 1986, J.A. A-132. This element of the plan was plainly designed to pierce the territorial integrity of surrounding school districts in spite of the district court's finding of no interdistrict liability under *Milliken I*. The ultimate goal, like the approach rejected in *Milliken I*, was to make the KCMSD more closely resemble the surrounding region in its racial composition. That goal, while laudable as a matter of public policy, is plainly excessive under the Fourteenth Amendment.

families." *Jenkins II*, 639 F. Supp. 19, 32 (W.D. Mo. 1985), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). The result is the erection of an *inter*district remedial plan for an *intra*district violation, a remedy that goes "beyond the original theory of the case." *Milliken I*, 418 U.S. 717, 745 (1974).

Comparing the June 1984 order denying interdistrict relief to the Eighth Circuit's October 13, 1994, opinion illustrates the extent to which the remedial plan has gone astray. In 1984, the district court held:

> [T]he KCMSD and each [suburban school district] has an obligation to provide a unitary school system in *their* respective districts. Failure to dissolve, merge, legislate, cooperate or entice blacks into their districts does not, as plaintiffs suggest, evidence a constitutional violation for which this court can mandate an interdistrict remedy. Such actions may be urged by social scientists but that does not create a constitutional duty.

Order of June 5, 1984, J.A. A-733-34. In sharp contrast, the court of appeals, ten years later, chastised the State for the failure to achieve a better racial balance between the KCMSD and the suburban districts:

> It is evident that the State's plan, no matter how reasonable, has failed to attract favorable reaction from the suburban school districts. For the plan to be successful . . . more must be done either by way of further inducements to the suburban districts, or in more coercive actions that the State is empowered to take. [I]f the State does not demonstrate its commitment, the court will seek other methods of accomplishing ["voluntary" student transfers] at the State's expense.

Jenkins VI, No. 94-1405, slip op. at 15 (8th Cir. Oct. 13, 1994) (citations omitted).

The decisions under review, like the Eighth Circuit decision quoted above, cannot be reconciled with this Court's holding in *Milliken I* that vestiges of intradistrict

de jure segregation do not support an interdistrict remedy mandating racial balance that extends to surrounding suburban districts. 418 U.S. at 752. The expansion of the lower courts' remedial "goals" to impose an interdistrict remedy in this intradistrict case requires reversal.

C. The Courts Below Acted Beyond Their Constitutional Authority In Imposing A Remedy Designed To Cure Conditions That Are Not, As A Matter Of Law, "Vestiges" Of *De Jure* Segregation.

The courts below have made clear that the "goals'" of the remedy they have constructed and are expanding go far beyond the eradication of the dual school system that was operated within the KCMSD decades ago.[21] Indeed, those courts have expressly adopted two new goals: (1) "to make available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district," *Jenkins II*, 639 F. Supp. at 54, and (2) to attract "non-minority students from the private schools who have abandoned or avoided the KCMSD, and draw in additional non-minority students from the suburbs." *Jenkins III*, 855 F.2d 1295, 1301-03 (8th Cir. 1988).

The courts have used these goals to justify the continuing expansion of their remedial authority, asserting

[21] The district court's remedial orders repeatedly acknowledge that the goals of the remedial plan go beyond the elimination of the vestiges of *de jure* segregation: "The difficult question which remains is, which programs are appropriate to remedy the ill effects of the unconstitutional segregation *and* to attract and maintain non-minority enrollment." *Jenkins II*, 639 F. Supp. 19, 24 (W.D. Mo. 1985) (emphasis added). "Reducing class size will serve to remedy the vestiges of past segregation . . . *as well as* . . . maintaining and attracting non-minority enrollment." *Id.* at 29 (emphasis added). That the district court fundamentally misunderstood the purpose of an intradistrict remedy is clear: "To accomplish desegregation within the boundary lines of a school district whose enrollment remains 68.3% black is a difficult task." *Id.* at 88.

that the realization of these aims is necessary to remove the supposed "vestiges" of the dual school system. In particular, the district court has stated: "the preponderance of black students in the district was due to the State and KCMSD's constitutional violations, which caused white flight," *id.* at 1302, and that " '[s]egregation has caused a system-wide reduction in student achievement in the schools of the KCMSD.' " *Id.* at 1300 (quoting *Jenkins II*, 639 F. Supp. at 24 (emphasis deleted)). But neither "white flight" nor a "reduction" in system-wide achievement is a true vestige of *de jure* segregation.

By mischaracterizing certain conditions as "vestiges" of segregation—and measuring the scope of remedial authority against the goals of eliminating these vestiges—the courts below have, over time, fundamentally expanded and distorted the remedial portion of this case. The State's ability to control its own budget has been usurped because the State has been judged as having failed to achieve compliance with a desegregation "plan" that lacks constitutional foundation. This limitless approach has spawned an ever-growing remedy "ageless in [its] reach into the past, and timeless in [its] ability to affect the future." *Wygant* v. *Jackson County Bd. of Educ.*, 476 U.S. 267, 276 (1986) (plurality opinion of Powell, J.).

1. The Court has never been called upon to articulate a precise standard for identifying the "vestiges" of *de jure* segregation. However, this Court's desegregation decisions make clear that a "vestige" of discrimination must be an identifiable condition or practice fairly traceable to—*i.e.*, proximately caused by—the original constitutional violation. See *Milliken II*, 433 U.S. 267, 282 (1977); *Pasadena Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 434-35 (1976). Absent such a limitation, the federal courts would be free to impose remedial plans that endure far beyond the "temporary measures" envisioned since *Brown II*. *Board of Educ.* v. *Dowell*, 498 U.S. 237, 249 (1991). Such unfettered remedial plans would, by defini-

tion, surpass "the ultimate objective" of desegregation remedies: "alleviating the initial constitutional violation." *Freeman* v. *Pitts,* 112 S. Ct. 1430, 1445 (1992).

To trace current conditions to the past *de jure* segregation, there must be an identifiable "causal link." [22] *Id.* at 1448. Because the condition being addressed must have a "*real and substantial relation* to [the] *de jure* violation" being remedied, *id.* (emphasis added), those vestiges that federal courts have a mandate to alleviate must be tangible "remnants" of the unconstitutional dual school system. Consequently, they must not only have been caused by the dual school system in a "but-for" sense, but also have been a part of that dual system. Thus, this Court has approved remedial schemes addressing such vestiges of *de jure* segregation as inferior facilities for heavily minority schools, *e.g., Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-19 (1971); gerrymandered attendance and transportation zones, *e.g., Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 461-62 nn.8-10 (1979); maintenance of two high schools when one could serve all students, *e.g., Green* v. *County Sch. Bd.*, 391 U.S. 430, 442 n.6 (1968); the use of mobile classrooms to prolong the existence of racially distinct facilities, *e.g., Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 192 (1973); and racially separate teacher associa-

[22] Fundamental tort-law causation principles are inherent in the notion that only those conditions that themselves "violate the Constitution" or "flow from such a violation" are properly remediable. *Milliken II*, 433 U.S. 267, 282 (1977). As Professors Prosser and Keeton have commented, "In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events, and beyond." W. Page Keeton *et al., Prosser and Keeton on Torts* § 41, at 264 (5th ed. 1984). Yet the ripple effect of an event on human history is decidedly not the basis on which we impose tort liability, *id.*; neither should it be the basis on which federal courts may supplant local control over school districts.

tions, student councils, or athletic leagues, *e.g., Swann*, 402 U.S. at 18.[23]

This Court has made clear that for a current condition truly to be a vestige of a dual school system, it is not enough that the condition be "a sort of 'fruit of the poisonous tree' " because a federal court believes that "some of the racial imbalance that presently obtains may have resulted in some part from . . . [earlier] segregative action." *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 416, 417 (1977) (disapproving holding below because "instead of tailoring a remedy commensurate to . . . specific violations, the Court of Appeals imposed a system-wide remedy going beyond their scope"). Thus, desegregation decrees are not properly designed to alter conditions or practices not "inherent in the dual school system," *Swann*, 402 U.S. at 22, such as demographic shifts resulting in disparate racial populations. See, *e.g., Spangler*, 427 U.S. at 436; *Freeman*, 112 S. Ct. at 1448. *Cf. Austin Indep. Sch. Dist.* v. *United States*, 429 U.S. 990, 994-95 (1976) (Powell, J., concurring) (criticizing attempt in desegregation decree to remedy residential segregation).

2. As this Court has observed, passage of time since the original violation makes it far less likely that the necessary causal link exists, particularly when that period is *not* characterized by the sorts of actions associated with the institution of the former dual school system. See *Dowell*, 498 U.S. at 249 (noting that original finding of *de jure* segregation had occurred 30 years earlier, injunctive relief had been entered 19 years earlier, and defendant had complied with the decree in good faith for 13 years). Accordingly, a determination of whether there is any link between the presumed "vestiges" identified by the courts below—"reduced" student achievement scores system-wide and "white flight"—and the earlier dual

[23] Not surprisingly, those conditions found to be "fairly traceable" to the original violation are tied to the *Green* factors. *See supra* pp. 28-29.

school system must take into account both the remoteness in time of these conditions to the former *de jure* school system and the intervening conduct of the State and the KCMSD. See *Freeman*, 112 S. Ct. at 1449; *Dowell*, 498 U.S. 237, 249-50 n.2 (1991).

In light of the State's limited involvement in the operation of the KCMSD, see *supra* pp. 4-7, the district court rested the State's liability principally on the pre-1954 imposition of a dual school system requirement pursuant to state law. *Jenkins I*, 593 F. Supp. 1485, 1488, 1490 (W.D. Mo. 1984). The court found, however, that the State had abandoned that unlawful requirement almost 40 years ago. *Id.* at 1490; see also Order of June 5, 1984, J.A. A-734. See *supra* note 8. As the district court correctly observed in its first decision on liability, the "fluid nature" of the movement of people in our modern society means that "acts now 30 years past have negligible present effects." *Id.*, J.A. A-813. Indeed, many of the *parents* of today's Kansas City students had not even started school at the time that the State expressly abandoned *de jure* segregation. Not one of today's students has attended school in a *de jure* dual school system.

Not only is the original violation remote in time, but the evidence also demonstrates the KCMSD's and the State's exemplary "record of compliance," *Freeman*, 112 S. Ct. at 1446, in recent decades. The State of Missouri has spent close to one billion dollars to remedy any vestiges that might have remained in the KCMSD *after* the implementation of the 1977 "6-C" intradistrict desegregation plan. The "remedy" ordered over the last 10 years, though not required—or sanctioned—by the Constitution, has been implemented in every respect by the State. It was undisputed below that the State had complied with the district court's orders requiring massive funding of over $300 million for implementation of the quality education component of the desegregation

remedy. Indeed, the district court found that the overall quality of KCMSD education programs was equal to or better than comparable programs offered in any surrounding Missouri suburban school district. See *supra* p. 12. There can be no question that "the [State has] complied in good faith with the desegregation decree since it was entered." *Dowell*, 498 U.S. at 249-50; see also *Freeman*, 112 S. Ct. at 1449 (emphasizing importance of a "history of good-faith compliance").[24]

In sum, equitable principles dictate that any identification of a "vestige" of segregation within the KCMSD must acknowledge two things. First, any direct constitutional violation ended sometime between 18 and 40 years ago. Moreover, at least since 1977, the State and the KCMSD have provided unprecedented resources to eliminate remnants of the dual school system. *See Swann*, 402 U.S. at 16.

3. The lower courts invoked "white flight" as a "vestige" justifying extraordinary measures designed to boost the "desegregative attractiveness" of the KCMSD. But both the record below and the district court's own findings make clear that "white flight" cannot, as a matter of law, be deemed a vestige of segregation. The district court did not mention "white flight" in any of its orders establishing or approving expenditures for magnet schools.[25] To the contrary, the principal finding by the district court regarding "white flight" during the rele-

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[24] This compliance has occurred against a backdrop in which the KCMSD has for many years now "implemented a racially neutral attendance pattern." *Pasadena City Bd. of Educ.* v. *Spangler*, 427 U.S. 424, 436 (1976).

[25] Indeed, the "finding" to which the court of appeals refers in its August 25, 1986, order, is not a finding at all, but a statement the district court made more than a year after the remedial decree was entered, that it had *previously* "found that segregated schools, a constitutional violation, has led to white flight from the KCMSD to suburban districts [and] large numbers of students leaving the schools of Kansas City and attending private schools." Order of Aug. 25, 1986, J.A. A-126. No citation was given by the district court, and no previous finding actually exists.

vant period of segregation (1968-1973) was that the "numbers involved are too insignificant to have had a segregative impact on the KCMSD or the [suburban districts]." Order of June 5, 1984, J.A. A-757. The Eighth Circuit itself has acknowledged that plaintiffs' "argument based on the actions of KCMSD and white flight run[s] contrary to the factual findings." *Jenkins II*, 807 F.2d 657, 670 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987).

Moreover, as the district court specifically found, there is "an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to *integrate* its schools." *Jenkins III*, 672 F. Supp. 400, 412 (W.D. Mo. 1985) (emphasis added), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988). The record shows that "white flight" did not occur until the late 1970s, when the desegregation plans were implemented. Pet. App. A-51. The district court also found other causes for the demographic changes within the KCMSD: "[J]obs and economic opportunity were primary motivators for blacks leaving the three county area and moving to Kansas City and elsewhere, and . . . any motivation resulting from segregated schools was *de minimis* and insignificant when compared to those primary motivating factors." Order of June 5, 1984, J.A. A-737. Thus, characterizing "white flight" as an effect of segregation is both counter-intuitive and wholly contrary to the record.

Given the lack of factual support for the assumption that "white flight" is a vestige of *de jure* segregation, the courts' analysis necessarily rests on a far-reaching theory of "but-for" causation—one that would make the State liable for an effect of *desegregation*, rather than for the "incremental" effects of segregation itself, which is the limit of the constitutional violation. And even if such a highly theoretical stream of causation were somehow enough to regard "white flight" as a vestige of the former dual school system, intervening social, economic, and

demographic factors—as well as the passage of time—have made the relationship of current-day "white flight" to the past segregative acts simply "too attenuated to be a vestige of former school segregation." *Board of Educ.* v. *Dowell*, 498 U.S. 237, 250 n.2 (1991). See also *Keyes* v. *School Dist. No. 1*, 413 U.S. 189, 211 (1973) ("at some point in time the relationship between past segregative acts and present segregation may become so attenuated as to be incapable of supporting a finding of *de jure* segregation warranting judicial intervention").

There can be no doubt that the Eighth Circuit's effort to cure "white flight"—a problem arising out of private parties' responses to desegregation, not segregation—seriously enlarges existing notions of remedial duties. As almost every desegregating school district experiences some demographic changes, see *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1447-48 (1992), the Eighth Circuit's approach would mean that the initial remedy would beget the need for additional remedies. Often, as here, this chain of causation would lead a court to impose interdistrict remedies in intradistrict cases or go beyond matters that are within the State's or school district's control. The result would be a continuing cycle of cause and effect, leaving school districts under the perpetual control of the federal courts and requiring remedial plans of potentially indefinite duration and enormous scope. Both consequences are fundamentally at odds with the core holding in *Dowell*.[26]

While the departure of non-minority students will not excuse the failure of a school district to desegregate, it is

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[26] The KCMSD may be concerned that its own funding resources are inadequate to continue all of the extraordinary educational programs that have been developed in Kansas City. But this is precisely the type of "baggage" that desegregation remedies cannot carry. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22 (1971). If the KCMSD is fully unitary, then the State's obligation must terminate, as this Court made clear three years ago in *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992).

equally true that school districts are under no constitutional obligation to undo the effects of such private conduct. Indeed, if the State's deep pocket were not available in this action, no one would seriously argue that the Kansas City School District could be ordered to pay the enormous sums necessary to attract non-minority students from the suburbs—rather than simply to eliminate racially identifiable schools within the district.

4. The lower courts also identified "reduced" system-wide achievement as a vestige of segregation. See, *e.g.*, Pet. App. A-20-21. To cure this "vestige," the courts mandated that the KCMSD take steps to attract non-minority students from surrounding suburban districts, including the improvement of KCMSD student achievement. See *Missouri* v. *Jenkins*, 495 U.S. 33, 76 (1990) ("conclusion that desegregation might be easier if more non-minority students could be attracted into the KCMSD was used as the hook on which to hang numerous policy choices about improving the quality of education in general within the KCMSD") (Kennedy, J., concurring in part and concurring in judgment). In responding to this "vestige," the district court devised a remedy that imposes a requirement of comparability *to suburban school districts*:

> The long term goal of this Court's remedial order is to make available to *all* KCMSD students educational opportunities *equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district.*

Jenkins II, 639 F. Supp. 19, 54 (W.D. Mo. 1985) (emphasis added in part), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). On its face, this standard makes unitary status dependent upon factors outside the district, a course this Court rejected in *Milliken I*. "It cannot be contended that interdistrict comparability, which was the ultimate goal of the district court's orders, is itself a constitutional command." *Missouri* v. *Jenkins*, 495 U.S. at 74 (Kennedy, J., concurring in part and concurring in judgment).

Moreover, such a "suburban comparability" requirement is not based on any showing that current achievement scores are the result of *de jure* segregation of decades ago. It defies logic to believe that past segregation has any effect on the academic achievement of *non*-minority students today. Nor does the record in this case show that even minority students in the KCMSD have lower scholastic skills *as a direct result of de jure segregation that they (and probably even their parents) have never experienced*, especially in light of the many external factors that affect achievement. See *infra* note 32.[27] Where the remedy is properly tailored to the constitutional violation, courts may of course require special remedial programs for the students directly harmed by racial segregation. *Milliken II*, 433 U.S. 267 (1977). But such authority should not be mistaken for a federal judicial license to "provide the KCMSD with facilities and opportunities not available anywhere else in the country." Pet. App. A-115.

Even if "reduced" achievement system-wide were a vestige of Missouri's earlier dual school system, the appellate court's adoption of the educational achievement

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[27] At most, the testimony cited by the district court in support of its achievement reduction finding establishes only that in many —though not all—KCMSD schools, student performance on standardized tests lagged behind national norms. *See Jenkins II*, 639 F. Supp. 19, 24 (W.D. Mo. 1985); Tr. of Apr. 21, 1985 at 22,130, 22,182 (testimony of Daniel Levine). That testimony also reflects, however, that urban districts with no history of *de jure* segregation also have below-average student achievement, *id.* at 22,228-29, and that some schools in the KCMSD characterized by plaintiffs as "racially isolated" were actually *at* national norms, *id.* at 22,134, because they consisted of students from "predominantly middle class black families." *Id.* at 22,340. The trial court refused to allow the State to question the district's witness on how he could determine that low achievement in the KCMSD was attributable to segregation rather than other factors, on the ground that the court "was not going to get into liability issues." *Id.* at 22,253-54.

standard would nonetheless fall wide of the mark of determining the *State's* responsibility for alleviating vestiges of prior segregation. The KCMSD instructional program is not a program designed, managed, or implemented by the State. Rather, that program is the creation of the plaintiffs, the KCMSD, and the courts below; the State's only role is to provide the funds to finance the program. Thus, the system-wide achievement test does not measure the State's commitment to end segregation, and it certainly does not examine whether any vestiges that could be attributed to the State's pre-1954 actions still remain. To the contrary, it is at most a test of the wisdom of the courts' selection of a controversial educational tool and the KCMSD's success in using that tool. This misguided judicial inquiry should not give rise to any inference that the State has failed to do its part.

5. The across-the-board salary increases ordered by the courts below are equally far removed from the proper exercise of the courts' authority to eliminate "vestiges" of segregation. The error of the lower courts' orders requiring the State to pay extraordinary desegregation monies to fund salary increases for KCMSD cooks, janitors, parking lot attendants, and all other non-instructional personnel is plain from this Court's prior holdings defining the purpose of desegregation remedies. As discussed above, *supra* p. 24, this Court has long held that to require a remedial program, a federal court must find that "the constitutional violation caused the condition for which remedial programs were mandated." *Milliken II*, 433 U.S. at 286 n.17.

The record here is devoid of any finding that existing salary levels in the KCMSD flow from any earlier constitutional violation by the State.[28] The district court's

[28] Nor does common sense suggest such a nexus. As the five judges dissenting from the Eighth Circuit's denial of rehearing *en banc* observed, "logic does not directly relate the pay of parking lot attendants, trash haulers and food handlers, for instance, to any facet or phase of the desegregation plan or to the constitutional violations." Pet. App. A-58.

stark pronouncement that "[l]ogic and empirical data show that in the absence of [additional] funding for salaries, the District will not be able to implement its desegregation plan," Pet. App. A-86, was the *only* rationale given by that court. The court of appeals affirmed the district court's order granting salary increases to virtually every KCMSD employee. Especially with regard to non-instructional personnel, the lower courts have failed utterly to relate salary funding to the operation of a dual school system, the only constitutional violation in this case.

The possibility of a remedial scheme that exceeds the scope of its desegregation aims obviously is made even greater where courts stray from the course this Court's decisions establish, as this case demonstrates. The courts below failed to tie the court-ordered salary increases to equal educational opportunities in any of the six *Green* areas of school district operations. See, *e.g.*, *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1443 (1992); *Green* v. *County Sch. Bd.*, 391 U.S. 430, 435 (1968).[29] Untethered from the objective guidance provided by the *Green* factors, the court of appeals was able to uphold the salary order on the flawed—but in this litigation, oft-invoked—rationale that it would "improve the KCMSD's desegregative attractiveness." Pet. App. A-26.

The courts' generalized "desegregative attractiveness" standard provides neither the "factual proof" nor "reasoned statement of legal principles" required from a federal court that is "displac[ing] . . . the local authorities." *Dayton Bd. of Educ.* v. *Brinkman*, 433 U.S. 406, 410 (1977). Indeed, such a vague and limitless standard for upholding desegregation programs not only could be used to justify salary increases for employees such as

[29] *Green*, *Swann*, and *Pitts* refer "to the racial composition of teachers and staff," *Swann*, 402 U.S. at 18, not to satisfaction with their salaries. No party has shown or even claimed that higher salaries would enhance racial balance among faculty or staff. This is because there has been no inquiry into this issue at all, even though it is a core factor under *Green*.

cooks, carpenters, and clerical workers—as it has been used here—but also could just as "rationally" justify even more tangential and far-reaching societal relief. For example, such measures as providing jobs to parents, subsidizing housing, sponsoring neighborhood redevelopment, or improving crime prevention might increase the "desegregative attractiveness" of the KCMSD, despite the lack of any causal relationship between these proposals and the operation of a dual school system. But this Court explained in *Swann* that the reach of school desegregation cases cannot be so expanded:

> The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities. One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope . . . .

402 U.S. 1, 22 (1971). And as Justice Powell recognized in *Milliken II*, such a broad view of the scope of a desegregation case invites school boards and plaintiffs to use desegregation cases to "extract funds . . . from the State treasury," *Milliken II*, 422 U.S. at 293 (Powell, J., concurring), precisely what has occurred here.

The district court's assumed role as arbiter of KCMSD salaries, historically and logically a matter between a school board and its employees, is also contrary to this Court's emphasis on the paramount importance of local control over the educational process. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process." *Milliken I*, 418 U.S. at 741-42; see also *Freeman*, 112 S. Ct. at 1445; *Dayton*, 433 U.S. at 410. Further, just as " 'necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory

control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination,' " *Board of Educ.* v. *Dowell*, 498 U.S. 237, 248 (1991) (quoting *Spangler* v. *Pasadena Bd. of Educ.*, 611 F.2d 1239, 1246 n.5 (9th Cir. 1979) (Kennedy, J., concurring)), federal judicial control over schools should not extend beyond the *scope* necessary to remedy the discrimination found to exist or to have existed.

II. EVEN IF THE "GOALS" OF THE REMEDIAL PLAN WERE WITHIN THE PROPER SCOPE OF THE AUTHORITY OF THE COURTS BELOW, THOSE COURTS MANDATED IMPERMISSIBLE MEANS FOR ACHIEVING THE STATED GOALS.

A. The Eighth Circuit Erred As A Matter Of Law In Measuring The Success Of The Court-Ordered Programs By Reference To Standardized Test Scores.

Rather than correct the excessive scope and improper goals of the remedy ordered by the district court, the Eighth Circuit has built upon them by demanding increased standardized test scores as a precondition to unitary status. The Eighth Circuit's novel ruling apparently would measure the constitutional sufficiency of the "quality education" component of a comprehensive desegregation remedy by the amount of improved student achievement as measured by students' success on standardized tests. See *supra* p. 17; Pet. App. A-21, A-48, A-61. Such a guaranteed outcome standard is clearly beyond the mandates of the Equal Protection Clause. This outcome-based standard is wholly foreign to traditional equal protection analysis, and creates an untenable standard for determining when a desegregation remedy has achieved its purpose to the extent "practicable." See *Dowell*, 498 U.S. at 250; *Freeman*, 112 S. Ct. at 1446.[20]

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[20] The district court has been explicit in its dismissal of the "practicability" standard of *Freeman* and *Dowell*. In respect of student achievement, the court found that while "there has been a trend of improvement in academic achievement in the KCMSD,"

1. The "test score" approach finds no support in the Fourteenth Amendment; this Court repeatedly has held that education *per se* is not a fundamental right. See, *e.g.*, *Kadrmas* v. *Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988); *San Antonio Sch. Dist.* v. *Rodriquez*, 411 U.S. 1, 35 (1973). The Constitution provides no guarantee of an education of any particular quality or of any particular level of individual or collective achievement by students. In *Rodriquez*, this Court distinguished between protection of rights and supposed guarantees of certain levels of those rights:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's right to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.

411 U.S. at 36. In other contexts, this Court has likewise never interpreted the Fourteenth Amendment to require equal outcomes. Rather, the Court has long defined an equal protection injury as the denial of equal opportunity resulting from the imposition of an unconstitutional barrier. See, *e.g.*, *Turner* v. *Fouche*, 396 U.S. 346, 362 (1970). The Fourteenth Amendment does not ensure any ultimate ability to obtain the benefit. *Id.* (plaintiffs had the right to be *considered* for appointment without the burden of invidiously discretionary disqualifications, but had no right to be *appointed*).[31]

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more needs to be done because "the Court is not satisfied that the District has reached anywhere close to its maximum potential." Pet. App. A-131. This novel "maximum potential" standard is wholly unsupported by this Court's holdings, which emphasize "practicability."

[31] The Court recently applied its equal protection injury analysis in *Northeastern Florida Chapter of Associated General Contractors* v. *Jacksonville*, 113 S. Ct. 2297 (1993), in which an association of general contractors challenged an ordinance according preferential

The Fourteenth Amendment requires only improved educational *opportunities*, not a particular level of education, as a prerequisite to either full or partial unitary status. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971), this Court stated:

> If we were to read the holding of the district court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse.

Id.; see also Pet. App. A-63. The Court's unwillingness in *Swann* to prescribe particular outcomes as a test for racial balancing dooms the Eighth Circuit's outcome-based standard for educational achievement. The elimination of dual school systems, not pre-ordained levels of scholastic achievement (or racial balance), is the hallmark of desegregation remedies. See *Brown I*, 347 U.S. 483, 493 (1954).

2. In addition, the mandate of improved test scores, as measured by national averages, is unreasonably broad and unworkable. The imposition of a *nationwide* standard —far beyond the scope of an intradistrict remedy—sets a goal that may well be unreachable in a practicable sense. Also, as discussed above, there is a lack of specific evidence causally linking system-wide achievement to past segregation. See *supra* p. 41.

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treatment to minority-owned businesses in awarding city contracts. *Id.* at 2299. The Court determined that because the association's members had been denied the *opportunity* to bid, the association had suffered an injury cognizable under the Equal Protection Clause. *Id.* at 2304. The Court contrasted its 1975 decision in *Warth* v. *Seldin*, 422 U.S. 490 (1975), where the Court held under similar facts that a construction association had *not* suffered an injury cognizable under the Equal Protection Clause. The two cases were readily distinguishable because the association in *Warth*, unlike the association in *Jacksonville*, had made no claim that its members could not apply for permits on the same basis as other firms. Rather, in *Warth* the complaint "was not that they could not compete equally; it was that they did not win." 113 S. Ct. at 2304. That latter claim stated no equal protection injury.

Moreover, as this Court and others have long recognized, numerous factors beyond the provision of educational resources, outside the control of the schools and unrelated to past *de jure* segregation, dramatically affect student achievement. For example, in *Board of Education* v. *Rowley,* 458 U.S. 176 (1982), this Court, in the context of a claim under the Education of the Handicapped Act, 84 Stat. 175, *as amended,* 20 U.S.C. § 1401 *et seq.* (1976 & Supp. IV) noted that "a myriad of factors . . . might affect at particular student's ability to assimilate information presented in the classroom." *Id.* at 198. In the instant case, Circuit Judge Beam, writing for the five dissenters to the denial of rehearing, recognized that the remedial responsibilities should properly be limited to what is within the defendants' control.

> To require achievement test scores at or above the national norm is to require the school system to be responsible for circumstances beyond its control. Segregated housing patterns, poverty, street violence, drug usage, criminal activities and lack of parental involvement, if they exist in the KCMSD, are not the responsibility of the public school system.

Pet. App. A-64.

The initial decision of the dedicated Eighth Circuit panel simply assumed, without any basis, that the State could succeed in raising test scores, apparently through the continued application of massive resources.[32] The

[32] The panel decision did not discuss non-school-related factors. Nor was any significant evidence presented before the district court, because the requirement of improved student achievement first surfaced in the Eighth Circuit's opinion below. However, in 1985 the trial court acknowledged that "it may be true that poverty results in low achievement regardless of race." *Jenkins I,* 593 F. Supp. 1485, 1492 (W.D. Mo. 1984). Dr. Alspaugh testified at the February 1993 hearing regarding magnet renewal that "children from families with less money tend to show lower reading and math achievement in the KCMSD elementary schools . . . . [S]tudent achievement is highly influenced by the socioeconomic characteristics of the students." Tr. of Apr. 21, 1985, at 2330, 2339.

That conditions other than educational resources determine results on standardized tests has been recognized not only by Dr. Alspaugh, the trial court, and the dissenting judges of the Eighth Circuit, but also in the scholarly literature. *See, e.g.,* D. Armor, *Why is Black Educational Achievement Rising* 66, The Public Interest (Summer 1992) (it is "well-documented that socioeconomic factors are among the major explanations of black-white achievement differences").

court of appeals' requirement that the State and the KCMSD demonstrate a test score increase as a prerequisite to withdrawal of court supervision would thus condemn the KCMSD to federal control for an indefinite period, contrary to the principles set forth in *Freeman* and *Dowell.* See *supra* p. 24.

This Court has never endorsed such a requirement and has routinely limited remedial responsibilities to matters within the control of defendants. As the Court stated in *Freeman,* "Where control lies, so too does responsibility." 112 S. Ct. 1445. The necessary corollary to this rule is that where control does not lie, as in the case of student achievement affected by factors far beyond the school yard, so too responsibility should not be imposed.

B. Across-The-Board Salary Increases For Non-Instructional Employees Will Not Have The Effect Of Drawing Suburban Students To The KCMSD.

As discussed above, the district court made no finding that the current pay scale was itself a vestige of the previous dual school system. Instead, the stated rationale for the court-ordered salary increases is that attracting better "staff" (*i.e.,* janitors, cooks, and clerical workers) to the KCMSD will increase the district's "desegregative attractiveness." Pet. App. A-90. But the court's statement to this effect is nothing more than an unamplified conclusion, lacking any discussion of or citation to record evidence. If the acknowledged superiority of the facilities and programs in the KCMSD schools has not succeeded

in drawing in white students from the suburbs, there is no reason to believe that further increasing the pay of school employees—particularly those who do not have any direct contact with students—will achieve that result. Thus, the court-ordered salary increases are demonstrably improper even when measured against the flawed goals of the courts below.

CONCLUSION

For the foregoing reasons, the judgments below should be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

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STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENTS KANSAS CITY, MISSOURI SCHOOL DISTRICT AND AMERICAN FEDERATION OF TEACHERS LOCAL 691

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the lower courts, in a case of prolonged State-mandated racial segregation with devastating effects on the educational opportunities available to the plaintiff school children, acted within their discretion in refusing to terminate remedial educational improvement programs as "unitary" where they found that the defendant seeking termination had not shown (1) that the vestiges of segregation which such programs were designed to remedy had been eliminated to the extent practicable; or (2) that release of jurisdiction in these areas would not have adverse consequences on other admittedly non-unitary aspects of the school system; and where there was no evidence (3) that the defendant seeking such termination had a good faith commitment to its constitutional obligations.

2. Whether the lower courts acted within their discretion to extend orders mandating that the State defendants help to maintain school district salaries at levels repeatedly found necessary to successful implementation of a largely voluntary desegregation plan, where the deplorably low original salaries were in part the result of the State's constitutional violation affecting school district funding.

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COUNTERSTATEMENT OF THE CASE

This controversy does not involve the issues decided by this Court four years ago in *Missouri v. Jenkins*, 495 U.S. 33 (1990), or those on which this Court denied *certiorari* five years ago, *Missouri v. Jenkins*, 490 U.S. 1034 (1989), but involves distinct issues concerning two components of the desegregation remedy for Kansas City, Missouri public school students. First, the lower courts found that the State of Missouri ("State") had failed to offer adequate proof under the clear standards set forth by this Court in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), to establish that educational improvement remedies previously ordered by the district court should be terminated as "partially unitary." The State, however, did not seek review of this relatively mundane, factual issue of the inadequacy of its proof. Instead it sought review of the more arresting, but uncontested, legal question of whether achieving some particular level of test scores is an inflexible prerequisite to unitary status. Brief of Petitioners at 22, 47.[1] Second, the lower courts each twice concluded, affirming earlier factual findings, that maintaining salaries for non-instructional personnel near market levels was necessary to implement the desegregation remedy and that the Kansas City, Missouri School District ("KCMSD" or the "District") could not provide such salaries alone, in part because of the State's constitutional violation affecting District funding. The State's second issue is nothing more than an attack on these settled factual findings.

Now, apparently recognizing the weakness of its arguments on the narrow issues purportedly presented by its Petition and the inadequacy of its proof in the district court, the State uses most of its Brief to make arguments that are far beyond the scope of these two issues. Most of the State's Brief, therefore, has a through-the-looking-glass quality about it, where imagi-

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[1] The Petitioners' Brief is cited hereinafter as P.B., the Petition as Pet., the Appendix to the Petition as P.A., and the Joint Appendix as J.A.

nation could easily be mistaken for reality and the State's long-since rejected legal arguments and inaccurate factual characterizations confused with live controversies actually addressed below. Indeed, the State raises a slew of factual and legal issues—challenging the district court's initial 1984 findings about liability, the effects of the constitutional violations, and the overall scope of the remedy required to cure them—that were finally resolved against it years ago, that are not addressed at all in any of the decisions under review, and that are not fairly raised by its Petition. No magnet school, capital improvement, or voluntary interdistrict transfer orders, and no orders establishing any new remedial programs, are before the Court.

A. The Constitutional Harms and the Court-Ordered Desegregation Remedy

The principal question decided below, whether the State has established that the KCMSD is partially unitary, arises from the State's opposition to a motion filed by the plaintiffs and the District seeking to continue for the 1992-93 school year certain educational improvements. The remedy originally was ordered because in September 1984, after a 92-day trial, the district court (the Honorable Russell G. Clark) found both the State and the District liable for unconstitutionally segregating the schools of KCMSD for a century and for failing for three decades in their affirmative duty to undo the harm of that segregation. J.A. 14, 46-50. The State did not appeal the determination of liability.

1. *The Effects of the Constitutional Violations.* In his initial liability order with respect to the KCMSD and the State, entered on September 17, 1984, Judge Clark explicitly found that the "inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District," J.A. 23, and that State-mandated segregation has resulted in the continued racial isolation of minority students. J.A. 24. In a series of subsequent orders, following the submission of additional evidence, Judge Clark found more specifically

that the constitutional violations had caused a variety of related injuries to KCMSD students. He explicitly found "a system wide *reduction* in student achievement in the schools of the KCMSD," J.A. 58 (emphasis in original); "low achievement" and a "general attitude of inferiority among blacks," J.A. 23; racial isolation in the schools, J.A. 24, 126; and severe deterioration in the physical conditions of the schools. J.A. 89, 133, 219-20, 237. The State is incorrect when it claims "[t]he *sole* vestige that the district court identified" in the liability order was the maintenance of segregated schools, P.B. 5-6 (emphasis in original), and that Judge Clark later identified certain "racially 'isolated' schools as the only vestige of *de jure* segregation within the KCMSD." P.B. 8. Judge Clark made no such statements.

Judge Clark did find that pervasive segregation remained in district schools. By 1984, 30 years after *Brown I* and seven years after the District first implemented on its own a largely ineffective busing plan, there were still "24 schools . . . racially isolated with 90+% black enrollment" and the dual school system had not yet been dismantled. J.A. 25. Judge Clark also expressly found that the segregated system and various acts of defendants had caused the departure of large numbers of white students to suburban and private schools. J.A. 126. The State did not challenge the finding that its constitutional violation and its failure to remedy it had caused segregation in student enrollment.

The district court also recognized severe deficits in the education and basic skills of KCMSD students caused by segregation. J.A. 23, 58. Judge Clark specifically found that "[the] education process has been further 'bogged down' in the KCMSD by a history of segregated education. Too often, as a result, a higher percentage of black students are among the lower achievers." *Id.* Segregation, Judge Clark confirmed, had "ruin[ed] attitudes" of black students in KCMSD. J.A. 23. Moreover, the court found that the situation was "correctable." J.A. 58. On appeal,

the State challenged Judge Clark's findings concerning the systemwide nature of these effects and the Eighth Circuit sitting *en banc* implicitly rejected this argument. *Jenkins v. Missouri*, 807 F.2d 657, 685 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987).

Judge Clark further found that the school buildings in the KCMSD had "literally rotted," J.A. 237, and that the lack of revenue that had caused this deterioration flowed directly from the State's unconstitutional conduct. J.A. 220. *See also* J.A. 133. Segregation led to the identification of particular KCMSD schools as "black," then to the identification of the KCMSD itself as a black district, then to severe underfunding and the deterioration of the entire system, and ultimately to an inferior education for all students who remained. In affirming the district court's findings, the Eighth Circuit explained that in this manner the State fostered increased segregation long after *Brown:* "The findings of fact demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." *Jenkins v. Missouri*, 855 F.2d 1295, 1305 (8th Cir. 1988), *cert. denied in relevant part*, 490 U.S. 1034 (1989).

2. *The Origin of the Remedial Components at Issue Here.* Judge Clark rejected mandatory busing as a remedy for these conditions. He explicitly found that "[t]he evidence is clear, further mandatory reassignment at this time will only serve to increase the instability of the KCMSD and reduce the potential for desegregation." J.A. 86. He ordered instead a desegregation plan based on educational improvements, magnet schools, capital improvements, and voluntary interdistrict transfers. J.A. 54-101. These programs all have the dual purposes of remedying the educational harms within the District and desegregating its schools through three complementary means: (1) to improve the education available to the

plaintiff school children; (2) to bring about, through individual family choices, a voluntary redistribution of children within the KCMSD; and (3) to reverse the State-initiated pattern of decreasing non-minority enrollment by maintaining white students and attracting back voluntarily those who had been driven to attend private and suburban schools as a result of the constitutional violations and the defendants' failure to remedy them. P.A. 18; *Jenkins*, 855 F.2d at 1302.

The cornerstone of this desegregation remedy consists of the basic educational improvements, known among the parties as the *Milliken II* programs because they generally are relief of the type that the Court first expressly approved in *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"). These programs were designed to directly redress the educational harms suffered by the plaintiff school children and to provide a foundation for other efforts to desegregate the District. *See, e.g.*, J.A. 64, 67, 71, 72 and 73.

Judge Clark did not fashion these basic educational remedies out of whole cloth but rather took guidance in their development from local authorities, reviewing desegregation plans submitted by the KCMSD and the State. While the State now accuses the district court in 1985 of using *post hoc* findings to "rationalize" an "expansion of remedial authority" to include educational improvements, P.B. 8, the State itself suggested such remedial measures at the time. Judge Clark agreed with the State's suggestion that it was "appropriate to include a number of properly targeted educational programs in a desegregation plan." J.A. 58 (quoting State Plan at 5). The State had noted the importance of "making sure schools give every student the opportunity for a good, fundamental education." State Plan at 2-3. The State specifically endorsed programs that would allow the KCMSD to achieve the AAA status (as defined by the State Board of Education) held by all of the other school districts

in the metropolitan area, J.A. 61; additional teachers, J.A. 63; an early childhood education program, J.A. 74; a summer school program, J.A. 70; full-day kindergarten, J.A. 72; and an extended school day in selected schools. J.A. 73. The State did not appeal "substantial portion[s]" of this initial remedial order, including most of these educational improvements. *Jenkins*, 807 F.2d at 682.[2]

Nor did the State challenge on appeal the district court's initial remedial orders approving salary relief in this case. These orders stem from Judge Clark's requirement that "the KCMSD has an obligation not only to eliminate the effects of unlawful segregation but also to insure that there is no diminution in the quality of its regular academic program." J.A. 234 (citations omitted). He further observed that the competitive position of the KCMSD regarding salaries "ha[d] deteriorated significantly" and that "[c]onsequently, KCMSD's ability to attract new teachers and retain present teachers has been restricted." J.A. 234-35. The court approved the expenditure of $7.147 million of locally raised desegregation funds for each fiscal year until 1991-92 "to fund teacher salary increases." *Id.* The State appealed this order, and challenged other issues but did not raise the salary increases for the 1987-88 through 1991-92 school years, and the Eighth Circuit left that portion of the order undisturbed. *Jenkins*, 855 F.2d 1295. The State sought *certiorari* on a number of issues involved in that decision but again

[2] The State raised issues concerning only the two *Milliken II* programs for which the district court had ordered it to pay 100 percent, challenging the cost allocation and claiming that both programs were inappropriate because they operated districtwide and not only in racially isolated schools. The Eighth Circuit sitting *en banc* rejected the State's claim that the relief was beyond the scope of the violation, but agreed that the costs should be shared by the KCMSD. *Jenkins*, 807 F.2d at 684-85. The State did not seek a writ of *certiorari* to challenge that decision.

did not challenge the salary relief. In 1990, following a court-ordered study of how KCMSD salary rates affect the desegregation plan, a settlement was reached among all of the parties, authorizing the KCMSD to use desegregation funds, contributed by KCMSD and the State, to maintain minimally adequate salaries over the next two-year period.

3. *The State's Appeals Concerning Other Remedial Issues.* While for years the State did not challenge on appeal most of the *Milliken II* programs and the salary relief, it appealed virtually every other aspect of the district court's early remedial orders. The State challenged the provision in the court's initial remedy order directing the State to establish and fund a voluntary interdistrict transfer plan under which KCMSD minority students could choose to transfer to any predominantly white suburban school districts that elected to participate. The State argued on appeal that requiring it to develop such a plan was an improper "interdistrict remedy for an intradistrict violation" under *Milliken I*. *Jenkins*, 807 F.2d at 683. The *en banc* Eighth Circuit affirmed, expressly rejecting the State's argument. *Id.* The State did not seek review in this Court of the Eighth Circuit's decision.

The State also challenged subsequent orders establishing magnet schools and requiring that dilapidated schools be renovated or replaced. The State challenged both the establishment of magnet schools and the renovation and reconstruction of schools, arguing that "the goal of attracting non-minority students from private schools and suburban schools is not warranted by the nature of the constitutional violation unless KCMSD and the State . . . caus[ed] students to withdraw from the system." *Jenkins*, 855 F.2d at 1302. The Eighth Circuit again held as a matter of law that "*voluntary* interdistrict remedies" could be used to desegregate predominantly minority districts, *id.* at 1302, and that the factual pre-condition for voluntary interdistrict relief under the State's standard was

satisfied in this case because the district court had correctly found that "the State and KCMSD's constitutional violations . . . caused white flight." *Id.* The State argued to the Eighth Circuit that Judge Clark's June 5, 1984 ruling dismissing the suburban school districts as defendants contradicted this finding, and the Eighth Circuit expressly rejected this contention. *Jenkins,* 855 F.2d at 1303. The State also argued again that the district court had erred in ordering the magnet school plan because it would improve education throughout the District. The court again rejected the State's argument that the remedy was impermissibly systemwide in scope. *Id.* at 1304.

The Eighth Circuit relied on the same reasoning in affirming the capital improvements required by the district court. The Eighth Circuit noted the district court's findings that unconstitutional segregation and the resulting denial of funding were "in part responsible for the decay of KCMSD's buildings" and that "capital improvements were necessary to restore the victims" of segregation where they would have been but for these constitutional violations. *Id.* at 1304-05; *see also Jenkins,* 807 F.2d at 685.

The State also appealed Judge Clark's determinations that it was necessary for the KCMSD to increase its tax levy to help pay for the desegregation plan. He had found that KCMSD did not have sufficient revenue to fund its full share without undermining the quality of its basic educational program and, as a result, the voluntary desegregation remedy itself, J.A. 234, and that the District's inability to raise sufficient funds was itself partially a product of the State's acts of illegal discrimination. *See supra,* page 4. Judge Clark had concluded that he had no choice but to order extraordinary funding relief, including increasing the District's property tax levy. On appeal, the Eighth Circuit modified the district court's order so as to enjoin certain State laws prohibiting the KCMSD from raising its property tax. *Jenkins,* 855 F.2d at 1314.

In 1988, the State sought a writ of *certiorari* from this Court to address the magnet school plan, the capital improvements plan, and the injunction against state laws preventing KCMSD from raising sufficient local revenues to pay toward its share of remedial costs. This Court denied *certiorari* on the questions involving the scope of the remedial orders but granted a writ to review the tax question. *Missouri v. Jenkins,* 490 U.S. 1034 (1989). The Court held that the district court had exceeded its authority in increasing the KCMSD's tax levy directly, but that the courts could enjoin State laws so as to allow the District to levy taxes in excess of limits set by State law in order to fund the desegregation remedy. *Missouri v. Jenkins,* 495 U.S. 33 (1990).

Overall, since the first remedial order in 1985 the State has appealed to the Eighth Circuit 16 times and sought *certiorari* six times. In the district court, the State also has consistently opposed and continues to oppose virtually every aspect of the remedy. P.A. 123. In 1991, the State accused the District of "repetitious failures" in implementation and in early 1992 asked the district court to place the KCMSD in receivership. J.A. 389. The following year, the State denied the KCMSD full accreditation. J.A. 563-65. Judge Clark specifically found in 1993 that "the State *never* offered a viable, even tenable, alternative and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD." P.A. 123 (emphasis in original).

B. The Proceedings Under Review

1. *Continuing the Milliken II Relief.* In the spring of 1992, the plaintiffs and the KCMSD moved the district court to order the continuation of the basic educational improvement programs for one year. The State, on the heels of this Court's decision in *Freeman v. Pitts,* 112 S. Ct. 1430 (1992), argued in its brief in response to this motion that these programs should be terminated because each individually was partially unitary. The State, however, did not file a motion seeking such relief. The

State stipulated, for most of the principal *Milliken II* components, that if the district court concluded that KCMSD was not partially unitary, "the parties agree to the budget and the scope of the program as proposed." J.A. 376, 402. Only with respect to two components did the State claim that the remedial proposal was not narrowly tailored to the scope of the violation. P.A. 72-73. With respect to other existing *Milliken II* programs, the State also reserved its factual arguments, including whether some of the programs were so ineffective that they should be terminated. J.A. 377-78.

Before ruling on the disputed portions of the one-year extension motion, Judge Clark conducted an evidentiary hearing. The District's evidence addressed the need for the pr[illegible]grams for which there was no stipulation with the Stat[illegible] In response to the State's claim that these programs w[illegible] ineffective, the District presented evidence that the r[illegible]ial isolation caused by segregation was decreasing and [illegible]tudent achievement was improving in the KCMSD. *See, e.g.*, J.A. 410-11, 417-22. Anticipating a possible attempt by the State to demonstrate partial unitary status (despite the fact that the State had filed no motion seeking such relief), the District also offered testimony that additional progress in remedying the vestiges of segregation previously identified by the district court was practicably attainable. *See, e.g.*, J.A. 422, 425. KCMSD's witnesses also confirmed that in practice the *Milliken II* programs remained integrally related to each other and to the rest of the remedy. J.A. 423-25.

In contrast, the State's single *Freeman* witness, Dr. Terry Stewart of the Missouri Department of Elementary and Secondary Education, testified only that (1) both defendants had complied with previous court orders concerning each program; (2) the level of certain educational resources provided by some of the programs was higher in the KCMSD than in some surrounding school districts; and (3) therefore, the quality of educational

opportunities in the KCMSD presumably must have "improved." The State's entire affirmative case on its *Freeman* argument is contained in 44 pages of the Joint Appendix. J.A. 439-83.

Dr. Stewart conceded that he had said *nothing* about whether the educational improvement components of the remedy had eliminated to the extent practicable the vestiges of segregation in the areas of student enrollment or educational quality. J.A. 483. The State never mentioned the racial composition of any KCMSD school. On the interdependence of the remedial programs, the State offered only conclusory testimony that those programs are "distinct and separate," J.A. 479, and argued that the orders developing the details of the various remedial components were entered at different times. It offered no evidence at all about its good faith commitment to the goals of the court-ordered remedy. Finally, the State also attempted to prove that some of the same programs that it claimed were partially unitary were also ineffective. *See, e.g.*, P.A. 70; J.A. 391. The State based its opposition to one program specifically on the State's factual contention that the program had resulted in inadequate student progress as measured by standardized test scores, rejecting the KCMSD's contention that a broader array of indicators should be examined. P.A. 70; J.A. 415-16.

After hearing the State's limited and contradictory evidence, Judge Clark did not act "without comment," P.B. 15, but stated clearly from the bench why he was rejecting the State's *Freeman* argument. While the State claims that "improvement in standardized test scores was the *only factor* lacking" with respect to unitary status, P.B. 17 (emphasis in original), Judge Clark did not mention test scores at all but explained that until the State came forward with evidence that the KCMSD's schools were desegregated to the extent practicable its argument that core elements of the desegregation plan should be terminated was unfounded:

> The Court's goal was to integrate the Kansas City, Missouri, School District to the maximum degree possible, and all these other matters were elements to be used to try to integrate the . . . schools. . . . [W]hen Dr. Stewart says no particular goal has been set, I think he's in error. The goal is to integrate the [KCMSD]. . . . If the [District] had not been segregated, the case woud not have been here in the first place. It's no constitutional violation to not provide quality free education. [J.A. 482.]

The court also rejected most of the State's factual contentions concerning the alleged ineffectiveness of particular programs, and ordered the continuation of most of them. P.A. 70-72. Judge Clark, however, agreed with the State that a proposed program to serve middle school students was not properly tailored because it proposed "use of desegregation funds to help remedy a nationwide problem which the KCMSD has not specifically shown to be a vestige of segregation." P.A. 73.

The State appealed Judge Clark's 1992 rejection of its *Freeman* argument, but the Eighth Circuit affirmed. The court of appeals held that the State had not met its burden of establishing partial unitary status under *Freeman*, concluding that the "evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable." P.A. 19. The Eighth Circuit identified two other independent reasons the State was not entitled to be released from its obligations. The State had failed even to address the other criteria set forth by this Court in *Freeman*: "whether retention of judicial control [over the educational improvement programs] was necessary or practicable to achieve compliance with the decree in other facets of the school system," and whether "[t]he State . . . has demonstrated a good faith commitment to the whole of the court's decree." *Id.*

The Eighth Circuit cited findings that Judge Clark made in two orders after his 1992 *Milliken II* order. P.A. 12-13. While the proceedings in neither of these matters are before this Court and were not before the

Eighth Circuit at the time, the court of appeals viewed them as illuminating Judge Clark's rejection of the State's partial unitary status arguments in 1992. The first such order was Judge Clark's ruling in April 1993 after a three-week hearing concerning the proposed continuation of the magnet school component of the remedy. The State did not argue that this component of the remedy was unitary but that it was ineffective. Judge Clark ruled that the magnet plan had made progress in desegregation in student assignments but also concluded that more progress was necessary and practicably attainable. P.A. 131. Likewise, he specifically found that while "there had been a trend of improvement in academic achievement in the KCMSD," the District has not made sufficient progress. *Id.* The court ordered the continuation of the magnet plan for two years, but denied the District's proposed modifications. No party appealed any aspect of this decision.

The second order concerned the plaintiffs and KCMSD's request for the continuation of the *Milliken II* programs for 1993-94 and 1994-95, which Judge Clark decided while the 1992 *Milliken II* appeal was pending. The State again argued in its response, without filing a motion, that these programs were "unitary" and that the State's funding obligation should end. At a one-day hearing, the State presented no live witnesses at all to support its *Freeman* argument; its only affirmative evidence on that issue was a brief affidavit from the same witness who had testified in support of partial unitariness at the 1992-93 hearing, reiterating the substance of his 1992 testimony. The State's affidavit was silent on the State's good faith, the inter-relatedness of the various remedial programs, and whether the remedy had succeeded in eliminating the vestiges of segregation to the extent practicable in KCMSD. In his July 30, 1993 Order,[3] Judge

[3] The State repeatedly refers to the district court's statement in this order that the KCMSD has "facilities and opportunities not available anywhere else in the country," *see e.g.* P.B. 12, 15, 37.

Clark again rejected the State's argument, because "[t]he *Milliken II* component is an integral part of the overall desegregation remedy;" "the State's arguments that these components have attained unitary status are unpersuasive;" "[t]he State should not be heard to complain that the desegregation plan is a complete failure on the one hand [referencing its opposition to the magnet plan] and that the *Milliken II* components are completely successful on the other; and while "the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy, . . . they have not yet met these goals in their entirety." P.A. 112-13. The Court found that it would be "wholly inappropriate to deem the KCMSD unitary or partially unitary. . . ." P.A. 113.[4]

The State failed in an attempt to secure rehearing or rehearing *en banc* from the Eighth Circuit's affirmance of the continuation of *Milliken II* relief at issue here. It did manage to create a controversy among the judges of the Eighth Circuit, however, persuading some that the panel had quietly elevated improvement in standardized test scores to make it an essential prerequisite to partial unitary status, P.A. 59, and provoking an explicit denial from the majority. P.A. 48 ("[n]othing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs should be ended by a declaration they are unitary"). Even the dissenters from the denial of rehearing *en banc*, however, questioned whether the State had made an adequate record

quoting P.A. 115. This statement is in the midst of a passage aimed at encouraging the non-party Kansas City government to do more to provide security for KCMSD's *buildings and equipment*. There was no evidence submitted to the court comparing these physical facilities to those in any other school district.

[4] The Eighth Circuit affirmed that determination. J.A. 578. The State's petition for *certiorari* from that decision is pending. *Missouri v. Jenkins*, No. 94-434 (filed Aug. 31, 1994).

to support its *Freeman* argument. P.A. 58. Rather than file a motion and supplement its record, the State filed its Petition seeking a writ of *certiorari* from this Court.

2. *Maintaining Salaries To Support Desegregation.* The second question the State raises in its Petition concerns the extension of orders repeatedly affirmed by the Eighth Circuit that require KCMSD's salaries to be maintained at levels that permit the hiring of capable personnel to implement the desegregation plan. In early 1992, the KCMSD, the American Federation of Teachers Local 691 ("AFT"), an intervenor in this case, and the plaintiff school children all sought continued desegregation salary relief. P.A. 76. Despite the fact that it had never challenged the 1987 salary relief and had agreed to such relief in 1990, the State proposed that salaries be rolled back to their 1986 levels. P.A. 83. The State's approach would have caused starting salaries for teachers to fall from "$22,215 to just over $17,000." P.A. 79. For a more experienced teacher or one with an advanced degree, the pay cut would have been even more dramatic. J.A. 485, 89-91, 494-97, 500-01. In contrast, the KCMSD proposed simply to maintain salaries at then-current levels. J.A. 492-93, 498-99.

After a four-day hearing, Judge Clark expressly reaffirmed his earlier unchallenged fact finding that support for District salaries is essential for desegregation. P.A. 88. "Logic and empirical data show that in the absence of desegregation funding for salaries, the District will not be able to implement its desegregation plan," P.A. 86, because salaries between 29 and 41 percent below market rates would make it impossible for the District to recruit or retain capable employees. J.A. 486, 497. Judge Clark did not limit his findings to the need for quality teachers and other instructional personnel: "In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain quality teachers, administrators and *staff*." P.A. 90 (emphasis added). Judge Clark concluded his order by stating in the strongest terms why he was rejecting the State's drastic alternative:

> The State's proposal would cause severe harm to the desegregation effort. It is critical to the success of the desegregation plan that the employees who carry it out are compensated at or near the relevant market rates of compensation so that the District can attract and retain employees with the training and experience necessary to implement the Court's plan. A salary roll back would result in excessive employee turnover, a decline in the quality and commitment of work and an inability of the KCMSD to achieve the objectives of the desegregation plan. [P.A. 91.]

When the KCMSD and the AFT each made different proposals in 1993 to maintain salaries at levels close to market levels for 1993-94, the State again proposed to roll salaries back thousands of dollars to pre-1987 levels. J.A. 514-15, 518-19, 524. After a three-day hearing in June of 1993, Judge Clark again expressly found that the "evidence presented at trial reaffirmed the position that the support personnel of the district are critical to the successful implementation of the desegregation program." P.A. 104. On the basis of these findings, he ordered continuing salary relief, which left District salaries "roughly competitive" with, but still as much as 7-28 percent below salaries paid by competing school districts to teachers with comparable levels of experience and education. P.A. 102; J.A. 512-13, 516-17, 520-21. Absent such relief, salaries would be as much as 41 percent below those in comparable districts. J.A. 497. The State appealed both decisions but did not challenge as clearly erroneous the district court's findings of fact concerning the necessity of this relief to effective implementation of the remedy. P.A. 23.

The court of appeals affirmed both of the district court's orders approving salary relief as part of the desegregation plan, on two grounds. First, the court affirmed the district court's unchallenged fact finding, based on the extensive evidence before it, that desegregation funding to maintain KCMSD salaries was "essential to comply with the court's desegregation order." P.A. 34. Just as

adequate facilities are critical to improving education and accomplishing desegregation through voluntary student assignment choice, so too are adequate teachers and staff. In addition, the Eighth Circuit reiterated its prior conclusion that the State's failure to remove the vestiges of the dual school system in KCMSD had contributed to the District's inability to raise sufficient funds to operate the school system, including paying adequate salaries. P.A. 26, 30-31. The State unsuccessfully sought rehearing or rehearing *en banc* of the salary issue. Again, not only was review denied, but even the dissenters from the denial of *en banc* review indicated that they would not rehear the district court's orders concerning salaries for "teaching and direct educational support personnel." P.A. 57.

C. The Present Status of the Remedy

Despite the State's obstruction and the massive injuries caused by the segregation of Kansas City's public schools, the KCMSD has made remarkable progress toward addressing the vestiges of segregation. The racial composition of the District's student enrollment has remained roughly constant over the last 10 years after decades of dramatic declines in the percentage of white students. J.A. 410-11. Voluntary student assignment choices have resulted in a 50 percent reduction since 1984-85 in the number of KCMSD elementary schools that remain more than 90 percent black. J.A. 417-19, 433-35. At a January 1993 hearing, one of the State's principal witnesses had to admit that the remedy had reduced segregation in "all fifteen [magnet] elementary schools that had suffered the most intense racial isolation," made progress in integrating secondary schools (some of which had "achieved high levels of integration"), and "substantially improved" on an index of desegregation in the schools. P.A. 129. The abysmal pre-1985 levels of student achievement in the KCMSD have also risen as a result of the District's remedial efforts, although all the educational vestiges of the constitutional violation have not been eliminated to the extent practicable. J.A. 419-21, 436-38.

While the cost of the effort to date to cure the violations has been considerable, the *Milliken II* and salary remedial orders at issue here involve nowhere near the $1.3 billion implied by the State, which covers the last 10 years' costs of all remedies, a substantial portion of which actually has been paid by the KCMSD. Rather, the *Milliken II* relief at issue here involved expenditures of approximately $54 million, or $1,478 per student in 1992-93, the only year for which the educational improvements were ordered in the decisions under review.[5] Only about 75 percent of this was paid by the State. In addition, substantially less than 20 percent of the salary relief goes to the salaries of non-instructional employees challenged here. J.A. 502 ("other employees," which includes hundreds of classroom paraprofessionals and school principals directly responsible for the education of children, as well as the support personnel attacked by the State, constitute about $10 million of the annual budget).

Finally, while the State discusses a number of totally unrelated developments in the district court, it ignores

[5] The overall per-pupil expenditure figures in the State's Brief, P.B. 17 n.15, are inflated as well. The State itself supplied these numbers directly to the Eighth Circuit and the dissenters from the denial of rehearing *en banc* simply adopted them, ignoring the District's earlier critique of the State's approach. *See* Letter from Patricia Brannan to Michael Gans (July 16, 1991); *see also* KCMSD Financial Plan Filed in Response to April 16, 1993 Order (filed July 30, 1993). The District had pointed out, for example, that the State's numbers included all expenditures but in calculating per-pupil costs did not count students in some court-ordered programs and generally were based on incorrect average daily attendance figures rather than actual enrollment. *Id.* 2-4. Correcting for these errors, the District's actual total current expenditures in 1991-92 were $7,665.18 per student, excluding capital expenditures, and $10,807.24 including capital expenditures. *See* 1991-92 Final KCMSD Annual Secretary of the Board Report (October 13, 1993) (expenditures) and KCMSD Financial Plan at Attachment A (enrollment). This latter figure remains misleading, however, because 1991-92 capital costs included a particularly large portion of the court-ordered renovation and reconstruction, most of which is now complete, and which will serve the District's students for decades.

significant recent developments. First, Judge Clark last year *sua sponte* ordered the parties to submit transition plans based on the assumption that the remedy will be phased out over a period of three, five, seven or 10 years. P.A. 141. Second, while the State incorrectly suggests that the 1992-93 cost of the *Milliken II* program was typical, P.B. 10, it neglects to mention that the costs have actually declined in each of the last two years.[6] Third, while the State has never filed a motion for partial unitary status in this case, it has recently announced its intention to do so in advance of a hearing anticipated for 1995 to consider the status of the remedy. State's Second Status Report Regarding Long Range Magnet Renewal and Capital Issues (filed November 10, 1994).

SUMMARY OF ARGUMENT

Before 1954, the State of Missouri aggressively mandated the segregation of Kansas City's public schools. From 1954 to 1984, the State did nothing to remedy the effects of its violation, and this failure, in conjunction with the District's, perpetuated the dual school system and exacerbated its effects in derogation of the clear mandates from this Court. After 1985, the State reflexively opposed virtually every effort to remedy the severe effects of these violations, unnecessarily prolonging the remedial process.

Despite the State's constant opposition, the KCMSD is making progress. The remedy ordered by the district court is working. Racial isolation is declining. The District provides better educational opportunities for the plaintiff school children and is eliminating much of the educational harm they suffered due to segregation. Yet more remains to be done in both areas to cure as fully

[6] For example, the annual budget for the Effective Schools program, which the State singles out for criticism, P.B. 9, was reduced by 50 percent this year by stipulation among the parties, from more than $7.3 million to $3.6 million. Order of July 17, 1994.

as practicable the severe effects of the constitutional violations found in 1984.

In 1992, the plaintiffs and the KCMSD filed a motion to continue for one year the basic educational improvements first ordered by the court in 1985. While the motion was pending, this Court decided *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), and within a few weeks the State had seized upon it as the latest weapon in its public crusade against the desegregation remedy in Kansas City. The State hastily filed a response claiming each of the foundational educational improvements ordered by the district court was now partially unitary and should be terminated. While stipulating to the budgets and the scope of most of the programs, the State reversed its long-standing tactic of criticizing the District's implementation of the remedy and argued instead that these particular programs had been fully implemented, had provided the books, teachers, librarians, and counselors as intended, and, therefore, should be terminated under *Freeman*.

When the district court held a hearing concerning which of the programs should be continued, however, the State offered *no evidence* that the vestiges of segregation in the District, including severe racial isolation and a systemwide reduction in academic achievement, had been remedied to the extent practicable. It offered *no evidence* about what factors other than segregation might have caused the over-90-percent black schools that remain or the continued educational deficits. It offered *no evidence* about how the voluntary remedy could continue to make progress in desegregating student enrollment if the basic quality of education were plunged back to 1984 levels. Finally, it offered *no evidence* that it had a good faith commitment toward desegregation in Kansas City. The trial court and court of appeals thus properly rejected the State's partial unitary status argument on the ground that it had failed to meet its burden of proof under *Freeman*.

Rather than offer any additional proof in the district court, however, the State simply changed its legal argument in the court of appeals. In unsuccessfully seeking rehearing *en banc*, the State latched onto dicta in the panel opinion indicating unremarkably that one should look to educational programs' effects on students in assessing whether the programs may be terminated as "partially unitary." The State repackaged this dicta as a statement all the parties agree is incorrect, the only dispute being whether the Eighth Circuit said it: A school district's progress toward unitary status in the area of educational quality must be measured by national norms on standardized tests, or some other numerical requirement. This Court granted *certiorari* to review this question and an unrelated, fact-bound question about the need to maintain certain district salaries at a level repeatedly found necessary to implement the desegregation remedy without diminishing the District's basic educational program.

Perhaps recognizing that when this Court examined its principal question presented, this Court would find no legal error—and no one defending the position it attacked—the State now claims that the educational improvements and salary relief continued here were impermissible to begin with, based on all the factual and legal arguments it has repeatedly litigated and lost over the past decade, none of which it raised in the proceedings below, or in its Petition. The State now devotes 90 percent of its Brief to these unpresented and long-resolved issues.

This Court should review, at most, the questions actually presented by the judgment below, examine the record, and conclude, as the Eighth Circuit did that (1) the State failed to meet the burden required by *Freeman* to prove partial unitary status; and (2) the district court's factual findings about the need for salary relief in order to implement the desegregation remedies are not clearly erroneous.

ARGUMENT

I. THE EIGHTH CIRCUIT CAREFULLY APPLIED THIS COURT'S STANDARDS FOR DETERMINING PARTIAL UNITARY STATUS

This Court in *Freeman* authorized district courts to exercise their discretion to withdraw supervision from general areas of school district operations only where (1) "the vestiges of past discrimination [in that area] had been eliminated to the extent practicable," 112 S. Ct. at 1446 (quoting *Board of Educ. of Oklahoma City v. Dowell,* 498 U.S. 237, 249-50 (1991)); (2) "there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn," *id.*; (3) "retention of judicial control is [not] necessary or practicable to achieve compliance with the decree in other facets of the system," *id.*; and (4) the defendant "has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Id.* The Eighth Circuit's decision recognizes each of these standards and correctly holds that the State failed to carry its burden of proof on three of these four issues. P.A. 19.

This Court left no doubt that partial relinquishment of judicial control in a school desegregation case is only appropriate "where justified by the facts of the case," *Freeman,* 112 S. Ct. at 1445, and that the burden of demonstrating unitary status rests with the defendant. *Id.* at 1447. The State's legal analysis of vestiges, P.B. 33-35, therefore, misses the point. There is no question that a "vestige of discrimination must be an identifiable condition or practice fairly traceable to . . . the . . . constitutional violation." P.B. 33. Once such a vestige is proven by the plaintiff and found by a court, however, the burden shifts to the defendant to establish that it has been cured. *Freeman,* 112 S. Ct. at 1447. *See also United States v. Fordice,* 112 S. Ct. 2727, 2743 (1992) (O'Connor, J., concurring) (it is the defendant's "burden to prove that it has undone its prior segregation"). Here, the State failed in the district court to move for a declaration of unitary status or to carry its burden of proof on this Court's standards for the partial relinquishment of judicial control. Instead, the State argued that the "establishment of the programs by compliance with the court order is all that is required." P.A. 19.

1. *Vestiges of Segregation.* In ignoring the racial composition of KCMSD's schools and focusing exclusively on the educational resources provided, the State misses one of the fundamental tenets of school desegregation law reaffirmed by this Court in both *Freeman* and *Dowell.* Defendants in school desegregation cases have an affirmative duty to remedy the constitutional violations that they have caused:

> The District Court should address itself to whether the Board ha[s] complied in good faith with the desegregation decree since it was entered, *and whether the vestiges of past discrimination ha*[*ve*] *been eliminated to the extent practicable.* [*Freeman,* 112 S. Ct. at 1446 (quoting *Dowell,* 498 U.S. at 249-50 (emphasis added)).]

The State simply failed to provide the district court with the facts necessary to determine whether it has accomplished this task. Because the State had the burden of proof on this issue and failed even to attempt to meet it, the judgment should be affirmed. Indeed, even the dissenters from the denial of rehearing *en banc* noted that whether the *Freeman* standards have been met may "still [be] an open question on the record before us today." P.A. 58.

The State did not even allege, let alone attempt to prove, that the educational harms and racial isolation caused by State-mandated segregation in the KCMSD had been eliminated to the extent practicable, although the basic educational improvements ordered in this case are designed to address the legacy of segregation in both of these areas. *See, e.g.,* J.A. 64, 67, 71, 72, 73 (educa-

tional programs ordered in part to remedy educational harm and to help in "attracting and maintaining non-minority student enrollment"). The State's evidence did not mention the level of racial isolation in the KCMSD, the "system wide *reduction* in student achievement," the "low achievement" among minority students, or the "general attitude of inferiority among blacks"—the very vestiges of segregation those programs are designed to remedy. *See supra*, pages 2-3. Indeed, despite claiming partial unitary status under *Freeman*, the State objected to the *relevance* of the evidence presented by the District concerning the levels of racial isolation and academic achievement in KCMSD. *See, e.g.*, J.A. 421.

It is ironic that the State claims before this Court that "the courts below have lost sight of the goal of eliminating one-race schools," P.B. 19, when in fact this goal was paramount in the district court's consideration of the State's partial unitary status defense, and the State itself failed to present a scintilla of evidence suggesting that by any measure KCMSD's student enrollment was desegregated to the extent practicable. When Judge Clark rejected the State's partial unitary status argument, he explained that the State's one *Freeman* witness was simply incorrect in assuming that the relevant goal in this case was providing resources comparable to surrounding school districts because "[t]he goal is to integrate the [KCMSD]." J.A. 482. "[A] critical beginning point [in assessing unitary status] is the degree of racial imbalance in the school district . . . ." *Freeman*, 112 S. Ct. at 1437. The State's proof never mentioned this "critical beginning point." *Id.* The evidence submitted by the KCMSD, while showing that significant desegregative progress had been made, also revealed that almost 20 percent of the District's 70 schools remained severely racially isolated, with student enrollments 90 percent or more black. *See, e.g.*, J.A. 433.

The State now argues correctly that remedies are inappropriate if they are geared "to counteract . . . massive

demographic shifts" unrelated to segregation, P.B. 25, 29 n. 19, but the State put on no proof whatsoever of factors other than segregation that may have caused the continuing racial isolation in KCMSD schools. While the State *now* apparently claims in this Court these conditions in the KCMSD were caused by "such factors as private decision making, local economics, or local demographics," P.B. 26, there is no evidence in the record below supporting this contention. While the State may try to prove these contentions in the district court in conjunction with its forthcoming *first* motion for unitary status, these unsupported factual allegations provide no basis for questioning the decisions under review.

The State likewise offered no evidence that the educational harms caused by segregation in KCMSD actually have been remedied to the extent practicable, but instead asked the district court to infer that opportunities must have improved because more resources are available, while it argued, at the same time, that some of the same programs that it claimed were unitary were so unsuccessful in remedying educational vestiges that they should be terminated. The State offered proof about poor educational results as measured by standardized test scores to support the latter argument, J.A. 415-16, but only offered evidence concerning the resources provided in support of its partial unitary status argument. While the State bore the burden of proof on this question, the District offered evidence that (1) student achievement had improved and (2) this improvement in outcomes reflected better educational opportunities. *See, e.g.*, J.A. 420-23. Specifically, the data and testimony showed that the District had made significant progress toward its "internal goal" of reaching national norms on standardized test scores, but that it still remained substantially below this level. J.A. 413, 420-23, 436-38. The District offered testimony that low student achievement results tend to indicate the continued existence of vestiges of segregation previously identified by the court, J.A. 423, but did not suggest that national norms represented the level KCMSD students would have

attained but for the constitutional violation or would have to reach for it to be cured. The State offered no testimoney that the original educational deficits *by any measure* had been cured to the extent practicable.

As with vestiges in the area of student enrollment, the State now claims, without any support in the record, that the "system-wide reduction in student achievement" found to have been caused by segregation is the result of other "numerous factors . . . outside the control of the schools." P.B. 48. The State's Brief postulates that "a myriad of factors" including "segregated housing patterns, poverty, street violence, drug usage, criminal activities and lack of parental involvement" may be at fault. *Id.* The State cites Judge Clark's 1984 statement that "it may be true that poverty results in low achievement regardless of race." P.B. 48 n.32. The fact that Judge Clark recognizes this possibility, however, makes all the more powerful his subsequent finding of fact that *segregation* caused educational harms to KCMSD students. Even more important, the State acknowledges that it offered not a shred of evidence to the district court about any of its hypotheses. *Id.*[7]

The State now attempts to rationalize this lack of proof about the educational harms caused by segregation in the KCMSD by arguing that the "well settled approach of *Green* makes no provision for" considering educational harms. P.B. 20. The *Green* factors, however, are not a rigid framework or exclusive list. Indeed, *Green* itself held that segregation must be eliminated "root and branch" from "every facet of school operations." *Green v. County School Board*, 391 U.S. 430, 435, 438 (1968). In *Brown*,

[7] The State now references one journal article and the subsequent testimony of its witness, Dr. Alspaugh, which it did not present to the court in conjunction with its partial unitariness claim at all, but seven months later when it tried to demonstrate that the magnet plan was unsuccessful. *Id. See also* P.A. 131. Dr. Alspaugh's principal conclusions did not address the educational programs at issue here, however, and tend to confirm that the educational harms of segregation have not been fully cured. J.A. 509.

this Court recognized that segregation causes educational harms:

> Segregation with the sanction of law . . . has a tendency to [retard] the educational and mental development of negro children and deprive them of some of the benefits they would receive in a racial[ly] integrated school system. [*Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).]

In *Milliken II*, the Court again acknowledged these educational harms and expressly approved desegregation remedies designed to address them directly. 433 U.S. at 287-88. In so doing, the unanimous Court recognized that the task undertaken was not one that would be finished overnight:

> These [educational] programs were not, and as a practical matter could not be, intended to wipe the slate clean by one bold stroke. . . . Rather . . . the victims of Detroit's *de jure* segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skills of specially trained teachers. . . . [*Id.* at 290 (emphasis in original).]

In *Freeman*, the Court reaffirmed the appropriateness of educational remedies. 112 S. Ct. at 1437. The Court also reiterated that under *Green* "a dual school system must be examined *in all facets*," *id.* at 1443 (emphasis added), including, but not limited to, the *Green* factors that "need not be a rigid framework." *Id.* at 1446-47. *See also id.* at 1454 (Souter, J., concurring) (discussing "*Green*-type factors"). The State's radical notion that whether educational harms have been remedied is irrelevant *as a matter of law* finds no support in this Court's jurisprudence and affords the State no protection from the record below.

2. *The Interrelatedness of the Remedial Components.* The Eighth Circuit also correctly concluded that the State

failed to prove that it is unnecessary for the district court to retain jurisdiction over the educational programs that the State claims are unitary in order to ensure compliance with the court's decree in other areas. P.A. 19. "[T]he components of a desegregation plan are interdependent upon, and interact with, one another, so that changes with respect to one component may impinge on the success or failure of another." *Freeman*, 112 S. Ct. at 1449. *See also id.* at 1454 (Souter, J., concurring).

The student assignment remedy here, premised on desegregating student enrollment through parental choice, rather than mandatory busing, is the quintessential example of such synergism. As Judge Clark made clear, it makes no sense to consider eliminating the *Milliken II* relief ordered in this case while vestiges of segregation in student enrollment persist; these educational programs are the foundation of the magnet school plan and the cornerstone of the overall remedy for the vestiges of segregation. The State's evidence failed to suggest how the magnet school plan could possibly be effective in attracting nonminority students (from other schools in the District or from private or suburban schools) to racially isolated KCMSD schools if, for example, the District's class sizes increased substantially, as the State proposed. Judge Clark has found and the Eighth Circuit confirmed that the remedial programs are an "integral part" of the overall remedy, and eliminating one would have serious consequences for the others. P.A. 112, 19. Even if the State had proved that no vestiges of segregation remain in the area of educational quality, which it did not, the decisions below are correct because the State totally failed to meet this independent requirement for partial unitary status.

3. *Good Faith.* Similarly, the State failed to allege or prove that it "has demonstrated a good faith commitment to the whole of the court's decree." P.A. 19 (citing *Freeman*, 112 S. Ct. at 1446). Proving "an affirmative commitment to complying in good faith" requires more than establishing the absence of "further acts of discrimination." *Freeman*, 112 S. Ct. at 1449-50. In *Dowell*, as well, the Court recognized that a "district court need not accept at face value the profession of a [defendant] which has intentionally discriminated that it will cease to do so in the future." *Dowell*, 498 U.S. at 249.

The Eighth Circuit's decision here, however, was far easier, for the State did not even offer such a profession to the district court. The only component of the remedy for which the State is principally responsible, voluntary interdistrict transfers, has never been implemented on a meaningful scale. P.A. 20 n.10.[8] In the proceedings below, it offered no proof whatsoever that might establish its good faith intentions to go forward on a constructive basis. The State tells this Court that there is "no question" as to its "good faith," P.B. 37, but the most recent relevant findings of the district court are that the State has "[1] opposed the implementation of any program offered to desegregate the KCMSD, [2] *never* offered a viable, even tenable, alternative and [3] been extremely antagonistic in its approach to effecting the desegregation of the KCMSD." P.A. 123 (emphasis in original).

4. *Transition Phase.* Judge Clark *sua sponte* has directed the parties to plan for the operation of the KCMSD when the defendants are released from court jurisdiction. P.A. 140-41. Proceedings are in progress in the district court analyzing the implications of a KCMSD financial plan, assuming withdrawal of court-ordered funding at alternative intervals. P.A. 141.

The State thus mischaracterizes the remedy in this case as "ageless in [its] reach into the past, and timeless in

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[8] The State argues that the Eighth Circuit in an unrelated order has made an interdistrict transfer plan "an essential precondition to unitary status," P.B. 14 n.12, but the Eighth Circuit actually was quite explicit in suggesting not that suburban district acceptance of a plan was required, but that effort by the State to encourage such a plan would go a long way in demonstrating good faith on the State's part. *Jenkins v. Missouri*, 981 F.2d 1009, 1016 (8th Cir. 1992).

[its] ability to affect the future," P.B. 33 (quoting *Wygant v. Jackson Board of Education,* 476 U.S. 267, 276 (1986)). The district court here is already circumscribing the remedy's reach into the future, and this case is far from "ageless." The magnet school portion of the remedy was only implemented at all schools covered by the plan three years ago, and the court-ordered capital improvements still are incomplete. This Court has made clear that the "relevant starting date" for purposes of analyzing a partial unitary status claim is when remedial efforts begin. *Freeman*, 112 S. Ct. at 1436. Thus, this case is not like *Dowell*, where the original finding of segregation occurred 30 years ago and injunctive relief began 19 years ago, but a case in which liability was found only 10 years ago and the first remedial order entered nine years ago, with some remedial efforts begun much more recently. Nor is this a case like *Freeman* in which DeKalb County was subject to court supervision for 25 years.

The State's remarkable assertion that "[n]ot one of today's students has attended school in a *de jure* dual school system" says nothing about conditions of segregation remaining in KCMSD, P.B. 36; many students still attending KCMSD schools unfortunately spent their critical early elementary grades segregated in rotting buildings where they received an inferior education before any effective measures were even begun.

Because the decisions below correctly applied the standards established by this Court in *Dowell* and *Freeman* and held only that the State failed to meet its burden of proof under these workable standards, and because the district court already is pushing this case toward a timely and just resolution, the Court should affirm the decisions below concerning the basic educational improvement remedies in the KCMSD.

II. WHILE THE STATE SUGGESTS THAT THE LOWER COURTS HAVE ESTABLISHED SOME SPECIFIC LEVEL OF ACHIEVEMENT ON STANDARDIZED TESTS AS A PREREQUISITE TO UNITARY STATUS, THEY HAVE NOT DONE SO, BUT HAVE STATED ONLY THAT EFFECTIVENESS SHOULD BE THE TEST OF WHETHER THE EDUCATIONAL COMPONENTS OF THE REMEDY HAVE MET THEIR GOALS

A. In Its Unsuccessful Effort To Secure Rehearing *En Banc*, the State, and Not the Lower Courts, Created a "Standardized Test Scores" Prerequisite to Partial Unitary Status

According to the State, this Court should reverse the Eighth Circuit because it allegedly created some new requirement for unitary status: "improved test scores as measured by national averages," P.B. 47, or a "suburban comparability in test scores," requirement. P.B. 22.[9] In fact, the panel opinion nowhere mentions the words "standardized test scores," "test scores," "national averages," or anything of the kind, and carefully follows the analysis described by this Court in *Freeman*. In explaining his reasons for rejecting the State's claim that these programs should be ended, Judge Clark did not focus on test scores either. P.A. 112-13. If the Court granted *certiorari* to review this question, which the State claimed was presented, the State has given it little to work with. Indeed, the State's Brief now backhandedly acknowledges this by devoting only four pages to this issue, merely repeating an abbreviated version of the argument made in its Petition. P.B. 45-49.

The State itself manufactured the alleged student-achievement-as-measured-by-test-scores standard out of one

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[9] The Brief of Petitioners is very vague on the precise nature of the State's complaint. While it cites national averages and suburban comparability as inappropriate measures of educational improvement, it inconsistently criticizes the courts below for allegedly failing to provide any "meaningful discussion" of "the relevant criteria for determining whether the Kansas City school system has become unitary." P.B. 20.

sentence of very general dicta in the panel opinion. Having rejected the State's partial unitary status argument because the record below demonstrated compliance, but failed to show that any of the other *Freeman* standards had been met, P.A. 19, the Eighth Circuit offered some further guidance to the parties in the following dicta:

> In view of the State's arguments that under *Freeman* it is entitled to a determination on an incremental basis that KCMSD had become unitary, *a few further words are appropriate* . . . . When the question of quality of education is reached, however, the issue is far more complex. The district court correctly observed that implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent practicable. The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation. [P.A. 20-21 (emphasis added).]

The last sentence in the quoted passage, taken out of context, is the State's textual basis for its extrapolation that the panel imposed an arbitrary test score standard for partial unitary status. In fact, the author of the panel opinion, the Honorable John R. Gibson, in the Eighth Circuit's subsequent opinion denying rehearing *en banc*, expressly disavowed rigid reliance on test score results:

> Test scores, however, must be only one factor in the equation. Nothing in this court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs should be ended by a declaration they are unitary. [P.A. 48.] [10]

[10] Judge Clark also expressly acknowledged that it is "no constitutional violation to not provide quality free education." J.A. 482. Both the lower courts, therefore, as well as all the parties agree that "this Court has repeatedly held that education *per se* is not a fundamental right." P.B. 46 (citing *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988); *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973)).

The dissenters from denial of rehearing *en banc* ignored what the panel said and adopted the State's interpretation of what the panel had wrought: "The only factor . . . standing in the way of unitary status for the educational programs was continued below average academic performance." P.A. 61. A fairer reading of the Eighth Circuit's brief dictum about assessing whether educational harms have been eliminated—"success of the quality education programs must be measured by their effect on the students"—is as a reaffirmation of the well-settled principle that *effectiveness* in eliminating vestiges of discrimination is the standard to be employed in assessing a school desegregation remedy. *See Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). This Court held early on in *Raney v. Board of Educ.*, 391 U.S. 443 (1968), and recently reaffirmed in both *Dowell* and *Freeman*, that a release of jurisdiction upon a showing merely that a school district adopted a remedial plan would "be inconsistent with the responsibility imposed on the district courts by *Brown II*." 391 U.S. at 449 (citations omitted).

The standard for judging a desegregation remedy is whether it puts the victims of unconstitutional conduct as nearly as reasonably possible in the position they would have been but for the constitutional violation. *Milliken II*, 433 U.S. at 280-81. Indeed, the cases that the State marshals in support of its argument that the Court should abandon its consistent jurisprudence establishing *effectiveness* as the standard for assessing desegregation remedies, address the distinct question of whether an "equal protection injury" sufficient to provide the basis for liability has been shown, and not the separate legal

issue presented here of whether adjudicated constitutional injuries have been cured to the extent practicable. *See* P.B. 46-47 n.31 (citing *inter alia Northeastern Florida Contractors v. Jacksonville*, 113 S. Ct. 2297 (1993)).[11] Establishing that a constitutional violation has occurred and determining whether it has been remedied are obviously different inquiries. The plaintiff seeking to establish a Fourteenth Amendment violation bears the burden of proving intentional discrimination denying equal opportunity. In contrast, the defendant seeking unitary status bears the burden of proof to establish that the injuries caused by such a denial have been remedied to the extent practicable. *Freeman*, 112 S. Ct. at 1444-45. Here the State did not present such evidence.[12]

B. All Parties Agree That Neither the State nor the School District Should Be Required To Ensure That Students Meet National Norms on Standardized Tests as a Prerequisite to Partial Unitary Status in the Area of Educational Quality

While the KCMSD has an "internal goal" of providing an education to all of its students that allows them to meet or exceed national norms, J.A. 413, the District expressly disavows the notion that "improved test scores, as measured by national averages" must necessarily be

[11] Likewise, the principal question in *Austin Indep. School Dist. v. United States*, 429 U.S. 990, 991 (1976), on which the State also seeks to rely, P.B. 35, was whether the Fifth Circuit had applied the correct standard in determining whether there was intentional discrimination sufficient to establish liability.

[12] The State also incorrectly suggests that this is a case somehow like *Richmond v. J.A. Croson*, 488 U.S. 469 (1989), where a city voluntarily adopted an aggressive affirmative action plan denying opportunities to non-minority contractors without a sufficient showing that there had been past discrimination against minorities or that the city had another compelling state interest justifying such an action. P.B. 24. Here, in contrast, after a 92-day liability trial, the district court made extensive, unchallenged findings of severe constitutional violations with specific devastating effects and only then ordered a remedy designed to address them.

achieved for it to be unitary. P.B. 47.[13] Establishing fixed student outcomes as a precondition to unitary status would be inappropriate because a court-mandated desegregation remedy must be designed to cure the harms *caused by the constitutional violation*. Just as independent demographic factors can sometimes affect the racial composition of student enrollments, independent factors can affect student performance. The possibility of such factors, however, cannot absolve the State and KCMSD of the responsibility to remedy the harms in fact caused by segregation.

This Court's opinions in *Freeman* and *Dowell* have provided the federal courts with ample guidance concerning how to determine whether this task has been accomplished and when desegregation decrees may be terminated. The standards articulated in *Freeman* and *Dowell* are being applied, and this Court's allocation of the burden of proof to the defendants has not foreordained the result in these cases. *Cf. Freeman*, 112 S. Ct. at 1452 (Scalia, J., concurring). The State need have no fear that application of the holdings of *Freeman* and *Dowell* to the issue of educational quality in Kansas City will result in a perpetual remedy. Courts applying this Court's *Dowell* or *Freeman*

[13] The State simply misrepresents the testimony of District officials in suggesting that they advocated a rigid standard of national norms on standardized test scores as a prerequisite to unitary status. The State claims that "KCMSD's Superintendent agreed . . . that the only hurdle to unitary status was that KCMSD students reach the 'national norm, the 50th percentile,' in achievement on standardized tests." P.B. 17-18 n.15. To the contrary, Superintendent Walter Marks testified unequivocally that (1) no fixed student achievement or racial balance standard had been adopted by the courts, J.A. 412, 414; *see also* J.A. 428; (2) national norms on standardized tests were strictly an internal goal, J.A. 413; and (3) it is possible that KCMSD could achieve unitary status without reaching this internal goal. J.A. 414. The State also incorrectly claims that a KCMSD administrator "endors[ed] a 100-year remedy," P.B. 26 n.16, where in fact the witness simply testified in response to a series of leading questions on cross-examination that the length of time was less significant than whether the harm had been remedied. J.A. 428-29.

standards have reached varying results; most district courts found the defendant unitary or partially unitary,[14] although at least two have declined to do so.[15] Five of the decisions that we have located have been appealed, and the district courts were affirmed three times and reversed twice.[16] As should be expected, these courts reached different conclusions; the harms caused by segregation were not the same everywhere, defendants' remedial efforts and local conditions differ, and district courts make different judgments in the exercise of their discretion to bring school desegregation cases to an appropriate end. This Court has consistently emphasized both the breadth of the federal courts' equitable powers to remedy past discrimination, *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), and the substantial deference owed to the lower courts' exercise of those powers because they have "first hand experience with the parties and [are] best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987) (quoting *Swann*, 402 U.S. at 6).

While determinations about whether educational harms have been cured may be more "ineffable" or "complex"

[14] *See Stell v. Board of Pub. Educ. of Savannah*, 860 F. Supp. 1563 (S.D. Ga. 1994); *Tasby v. Dallas Ind. Sch. District*, No. 3:4211-H (N.D. Tex. July 26, 1994); *Cisneros v. Corpus Christi Ind. Sch. District*, C.A. No. 68-C-95 (S.D. Tex. July 29, 1992); *Dowell v. Board of Educ. of Oklahoma City*, 778 F. Supp. 1144 (W.D. Okla. 1991), *aff'd*, 8 F.3d 1501 (10th Cir. 1993); *Lee v. Talladega County Bd. of Educ.*, 963 F.2d 1426 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1257 (1993); *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416 (11th Cir. 1992); *Brown v. Board of Educ.*, 671 F. Supp. 1290 (D. Kan. 1987), *rev'd*, 892 F.2d 851 (10th Cir. 1989), *vacated*, 112 S. Ct. 1657 (1992), *opinion reinstated*, 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1994).

[15] *Coalition to Save Our Children v. State Bd. of Educ. of Delaware*, 757 F. Supp. 328 (D. Del. 1991); and *Morgan v. Burke*, 926 F.2d 86 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1664 (1992).

[16] *Lee v. Etowah County Bd. of Educ.*, 963 F.2d at 1425; *Brown v. Board of Educ.*, 978 F.2d 585 (10th Cir. 1992).

than determinations about the existence of other vestiges, *Freeman*, 112 S. Ct. at 1441; P.A. 20, they are necessary and can be made under the standards already established by this Court. Where educational harms traceable to segregation have been found to exist, under the principles established by this Court, effectiveness in alleviating educational deficits caused by segregation and in providing equal educational opportunities regardless of race should be the standard of whether such vestiges have been eliminated. If effectiveness were not the test, and instead only the resources provided were the measure, educational harms would be "cured" as soon as the remedy begins to be provided. This would lead to the fallacious result that resources could be improved and particular programs deemed "partially unitary" almost immediately, then eliminated under the principles articulated in *Dowell*, with no beneficial impact on the children harmed by segregation.[17]

There are a variety of indicators that the lower courts may use to determine if educational vestiges have been eliminated. The availability of resources may be one of them. *See, e.g., Freeman*, 112 S. Ct. at 1441-42. The relevant inquiry should include the provision of teachers, facilities and programs, as the State suggests, but also may include an inquiry into whether students are treated differently depending on their race:

> Are more minority students suspended or expelled *for similar offenses* than their white peers?[18]

[17] The amicus brief filed in support of the State by the Landmark Legal Foundation actually undermines the State's position that examining what resources have been provided should be *the sole* measure of whether educational harms have been remedied. Landmark relies heavily on the research of Eric Hanushek, which indicates that there is no systematic relationship between school expenditures and school performance. Brief for Amici Curiae In Support of Petitioners at 14-17. If this is true, looking exclusively at dollars spent, or resources provided, must be an inadequate measure of effectiveness.

[18] *See, e.g., Tasby v. Estes*, 643 F.2d 1103, 1107 (5th Cir. 1981); *United States v. Wilcox County Bd. of Educ.*, 454 F.2d 1144, 1145 (5th Cir.), *cert. denied*, 419 U.S. 1031 (1972).

Are more minority students *inappropriately* placed in special education classes or remedial tracks? [19]

Are fewer eligible minority students *recommended for* or *placed in* honors or advanced placement courses? [20]

Do teacher attitudes and practices reflect *lower* expectations for minority students? [21]

Trial courts also should look to actual student performance to help determine if the provision of resources and the reform of discriminatory practices have been effective in compensating past victims and ensuring equal educational opportunities regardless of race. *See, e.g., Yonkers*, 833 F.Supp. at 220-25. Results can be measured in a number of ways including student attendance, grades, drop-out rates, post-secondary enrollment, and test scores. It is by no means unprecedented, however, for the Eighth Circuit to have indicated that test results should be among the factors considered, particularly given the unchallenged findings of severe educational harms in the KCMSD.[22]

But none of these factors, including test scores, should be considered a bright-line test. If disparities appear to exist between the victims of segregation and non-victims, or between white students and black students, this may or

[19] *See, e.g., Jacksonville Branch, NAACP v. Duval County Sch. Bd.*, 883 F.2d 945, 949-50 (11th Cir. 1989); *People Who Care v. Rockford Bd. of Educ.*, 851 F. Supp. 905, 912-15 (N.D. Ill. 1994).

[20] *See, e.g., Jacksonville*, 883 F.2d at 949-50; *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 659 F. Supp. 363, 368 (E.D. Ark. 1987).

[21] *See, e.g., United States v. Yonkers*, 833 F. Supp. 214, 222 (S.D.N.Y. 1993); *Bradley v. Milliken*, 402 F. Supp. 1096, 1139 (E.D. Mich. 1975), *aff'd*, 540 F.2d 229 (6th Cir. 1976), *aff'd*, 433 U.S. 267 (1977).

[22] *See, e.g., Freeman*, 112 S. Ct. at 1441-42 (district court evaluated "objective evidence of black achievement," the Iowa Test of Basic Skills, in determining whether or not the school district had achieved unitary status); *Yonkers*, 833 F. Supp. at 220-22; *Coalition to Save Our Children*, 757 F. Supp. at 332; *Brown*, 671 F. Supp. at 1307; *Reed v. Rhodes*, 455 F. Supp. 546, 598 (N.D. Ohio 1978).

may not mean that the constitutional harms have not been effectively remedied or that discriminatory practices persist. Trial courts should in the first instance consider such evidence, and if no relevant disparities exist may conclude that the educational harms of segregation have been cured. If disparities exist, however, this should not end the inquiry. Such current disparities in outcomes may not be traceable to past segregation, and, therefore, defendants may be released from court jurisdiction if they can prove that factors other than segregation caused them. *Freeman*, 112 S. Ct. at 1448; *see also Fordice*, 112 S. Ct. at 2736. School desegregation remedies are intended to be temporary, and there may come a point when even disparities found to be attributable to segregation have been reduced so much, or have proven so resistant to reduction, that no further remedial actions are practicable or educationally sound. If the defendant can prove that no further educationally sound remedy can reasonably be expected effectively to address any such lingering harms, this Court has indicated that it may be appropriate to allow such remaining constitutional harms to go unremedied. *Dowell*, 498 U.S. at 250 (vestiges of segregation must be eliminated "as far as practicable").[23]

We have no quarrel with this Court's clear standards, and it is apparent from the record below that the courts understand them and stand ready to apply them should the State or the KCMSD supply them with the appropriate evidence upon an actual motion for unitary status. The State did not file such a motion or provide such evidence and, for this reason, we respectfully submit the writ here was improvidently granted.

[23] The State disingenuously accuses the district court of dismissing the "practicability" inquiry under *Freeman* and *Dowell* because in a separate proceeding it stated that the District had not reached "anywhere close to its maximum potential." P.B. 45-46 n.30 (quoting Pet. App. 131). At that proceeding concerning magnet schools, the question of unitary status was *never mentioned* and the district court was agreeing with the State that more desegregation could be accomplished through the magnet plan. *See supra*, page 13.

III. THE STATE IMPROPERLY INVITES THIS COURT TO AVOID THE ISSUES PRESENTED IN ITS PETITION AND INSTEAD TO DISTURB FINAL FACTUAL FINDINGS AND REVERSE THE SETTLED LAW OF THIS CASE ON ISSUES NOT RAISED BELOW AND NEITHER FAIRLY PRESENTED BY ITS PETITION NOR NECESSARY TO THE RESOLUTION OF THE QUESTIONS THAT ARE PRESENTED

The State attempts to use its Petition as a Trojan horse to attack long-settled factual findings and legal rulings in this case. This Court should reject this ploy. The State betrays its representations to this Court that it "has no intention of relitigating decades-old liability issues," Petitioners' Reply Memo at 2 n.1, and "does not seek review of any factual findings," *id.* at 8. The State relegates the principal question articulated in its Petition—which itself is not actually presented by this controversy—to four pages of its Brief, and devotes virtually all its Brief instead to long-settled factual and legal issues that are outside of the scope of the questions upon which this Court granted *certiorari*.

In essence, the first 45 pages of the State's Brief repeat over and over three principal arguments about the State's liability, the injuries it caused, and the proper remedy for those injuries, all of which are incorrect, but more importantly have been finally resolved against the State in previous proceedings not presently under review:

(1) The State was not really all that responsible for segregated conditions in the KCMSD in 1984, *e.g.*, P.B. 36-37;

(2) The constitutional violations in Kansas City did not (or could not as a matter of law) cause white flight and reduced student achievement, *e.g.*, P.B. 37-42; and

(3) Those portions of the remedy designed to promote voluntary student transfers between districts were inappropriate, *e.g.*, P.B. 30-32.

For several reasons the Court should not address these issues.

First, *none* of these three issues is presented in the State's Petition. This Court's Rule 14.1(a) states that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." Rule 24.1(a) similarly provides that a brief on the merits "may not raise additional questions or change the substance of the questions already presented." *See Yee v. City of Escondido*, 112 S. Ct. 1522, 1533 (1992).[24]

Second, *all* of the State's three new arguments depend on the reversal of factual findings the district court made and the court of appeals affirmed long ago, or that the district court made and the State did not appeal. It is this Court's "settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the district court and the court of appeals have concurred." *Branti v. Finkel*, 445 U.S. 507, 512 n.6 (1980).[25]

The Court imposes a "heavy burden" on the party wishing to upset the factual findings of two lower courts. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975). The State ignores this burden. Nor should this Court review those factual findings which were made by the district court and which the State did not appeal to the Eighth Circuit. This Court routinely accepts as true the factual findings of a district court when those findings are not disturbed on appeal.[26]

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[24] *See also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (*per curiam*); *United States v. O'Brien*, 391 U.S. 367, 386 n.31 (1968) (issues "not raised in the petition for certiorari . . . are not before the Court."); *Namet v. United States*, 373 U.S. 179, 190 (1963) (same).

[25] *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987); *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 98 n.15; *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 113 S. Ct. 1489, 1499 (1993); *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 317 n.5 (1985).

[26] *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 35 n.1 (1991); *United States v. Consumer Life Ins. Co.*, 430 U.S. 725, 750 n.32 (1977).

Third, *none* of the State's new claims were addressed in the judgments under review. This Court ordinarily does not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*).[27] Because the validity of these rulings was not contested below by petitioner in these proceedings, this Court should not pass upon them now.

Finally, *all of* the State's new claims also challenge legal determinations long ago settled in this case. This Court should adhere to its principle that a legal decision made at one stage of a proceeding is normally followed in future stages of the same litigation. *Arizona v. California*, 460 U.S. 605, 618 (1983). Here, there is no indication that the ten-year-old decisions on liability and the 1985 *Milliken II* order in this case were "clearly erroneous and would work a manifest injustice." *Id.* at 618 n.8. Indeed, they are rooted firmly in this Court's jurisprudence.

A. The State's Attacks on the Findings Concerning Its Liability, the Effects of Its Violation, and the Remedy Necessary To Cure Them Have Been Finally Resolved and Are Not Before the Court

Each of the State's three principal new arguments should not be reviewed by this Court because of the four considerations outlined above.

1. *State Liability.* The State's argument that its liability is premised exclusively on the attenuated basis of its pre-1954 conduct was not presented in its Petition or in the proceedings below and failed 10 years ago, for two reasons. P.B. 22, 36-37. First, its pre-1954 discriminatory conduct was pervasive, and the district court so found in 1984. J.A. 46-47. Second, the State's liability was also premised on its utter failure to do anything to satisfy its affirmative duty to dismantle the dual school system.

[27] *See also Taylor v. Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 224 (1990); *Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988); *California v. Taylor*, 353 U.S. 553, 556-57 n.2 (1957).

J.A. 47-50 (citing, *inter alia, Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538 (1979) (*"Dayton II"*). This Court has only recently reiterated that liability may be predicated in part on a finding that the defendant "never actively set out to dismantle [the] dual system." *Freeman*, 112 S. Ct. at 1450 (citations omitted). The State did not appeal this liability decision and admits that it may not now directly ask this Court to overrule it. P.B. 7 n.8.

The State also attempts to minimize its liability by devoting seven pages of its brief to the June 5, 1984 Order dismissing the school districts surrounding the KCMSD from the litigation. P.B. 4-5, 27-28, 31, 36 and 38. The State, however, nowhere acknowledges that this order addresses *exclusively* the question of whether there exists a basis for including suburban school districts in the Kansas City area in a mandatory interdistrict remedy; it does not address the question of the *State's* liability or the effects in the KCMSD of the *State's* violation. Only after further proceedings, including presentation at trial of the State's case, did Judge Clark, on September 17, 1984, begin the series of orders dealing with the liability of the State and the KCMSD and the effects of their violations, which include some interdistrict effects, such as white flight to suburban and private schools. J.A. 14-53. Thus, the State's claim that the effect of the underlying violation is "solely intradistrict in scope" is incorrect. P.B. 14.

2. *Effects of the Violation.* The State boldly pronounces that the vestiges of segregation identified in this case 10 years ago were not really caused by segregation after all. *See* P.B. 20-22, 37-42. This argument is nowhere to be found in the State's petition. Moreover, ignoring the record in this case as well as the law of the case, the State now claims that the district court and the Eighth Circuit were simply wrong 10 years ago in finding that segregation had caused white flight from the KCMSD and implies that the lower courts likewise erred in finding that virulent segregation had severely damaged

educational opportunities in the KCMSD. While the State did not make this claim below, even the dissenters from denial of rehearing *en banc* expressly noted that segregation had caused "white flight to private and suburban schools" and a "system-wide reduction in student achievement." P.A. 51-52.

a. *White Flight.* The State's suggestion that white flight "was the result of desegregation—not segregation," P.B. 4-5 n.3, is contrary to the court's explicit findings. J.A. 126 ("segregated schools, a constitutional violation, has led to white flight"). The State attempts here to resurrect its attack on Judge Clark's factual findings concerning the white flight caused in KCMSD by the constitutional violations, P.B. 38 ("lack of factual support"), despite the fact that the Eighth Circuit twice rejected precisely the same contention more than six years ago. *Jenkins,* 807 F.2d at 683; *Jenkins,* 855 F.2d at 1302-03. The State did not seek this Court's review of the *en banc* Eighth Circuit's first decision on this point at all. After the Eighth Circuit's second ruling on this issue, the State presented this Court in its 1988 petition for a writ of *certiorari*—challenging the scope of the magnet school plan and the capital improvements—with precisely the same formulation of the argument it uses now. No. 88-1150, Petition at 17-18. Contrary to the findings already twice concurred in by the lower courts, the State claimed then that those courts were "turning effects of desegregation into effects of segregation." *Id.* at 18. *See* P.B. 39. This Court refused to grant *certiorari* on this issue, 490 U.S. 1034 (1989), and there is no reason for the Court to question these long-settled factual findings now.[28] The

[28] Moreover, the "demographics" that the State asks this Court to rely upon to make *de novo* findings of fact actually support the lower court's original finding that the State's failure to dismantle the dual school system in the KCMSD caused white flight. P.B. 4-5 n.3. During the period from 1954 to 1984 the black percentage of the District's enrollment increased from 19 percent to 68 percent. KCMSD Exh. K2 (1984). During the period from 1977 to 1984, when the State claims KCMSD was desegregating and creating white flight, black enrollment changed by only four percentage points. KCMSD Ex. K2. It is precisely because of this type of factual misstatement that this Court should hold fast to its customary refusal to disturb the findings of fact below.

State's suggestion that white flight, *as a matter of law,* cannot be caused by segregation is also unsupportable. Indeed, in *Freeman* itself, several Justices explicitly noted the fact that a defendant's actions *may* encourage white flight. 112 S. Ct. at 1454 (Souter, J., concurring); *id.* at 1458 (Blackmun, J., concurring). Demographic changes may be "caused by past school segregation and the patterns of thinking that segregation creates." *Id.* at 1454. Numerous federal courts also have found that segregative practices caused white flight.[29] Here, the courts repeatedly found, based on extensive evidence, that they did in Kansas City.

b. *Educational Harms.* The State now also seeks belatedly to challenge the oft-repeated findings concerning the severe educational harm caused by segregation in the KCMSD. P.B. 40-42. The State's suggestion that educational harms *as a matter of law* cannot be a vestige of segregation runs contrary to this Court's consistent school desegregation jurisprudence over the last 40 years. Any contention that as a matter of fact educational harms were not caused by the State and KCMSD is equally frivolous; Judge Clark's first liability order expressly recognized such harms, J.A. 23, extensive evidence supported them, and his remedial orders confirmed them. J.A. 23-24, 126. The State did not challenge the initial liability order nor claim that the findings of fact concerning the educational harms were clearly erroneous. The Eighth Circuit repeatedly noted and reaffirmed these findings as well-

[29] *See, e.g., Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.,* 778 F.2d 404, 417 n.8 (8th Cir. 1985), *cert. denied,* 476 U.S. 1186 (1986); *Berry v. School Dist. of Benton Harbor,* 467 F. Supp. 630, 686 (E.D. Mich. 1978); *Arthur v. Nyquist,* 415 F. Supp. 904, 929 (W.D.N.Y. 1976), *aff'd in relevant part,* 573 F.2d 134 (2d Cir.), *cert. denied,* 439 U.S. 860 (1978).

supported by the record. *See, e.g., Jenkins,* 855 F.2d at 1300; *Jenkins,* 807 F.2d at 683-84. As the dissenters from denial of rehearing *en banc* below stated succinctly, "[t]here is no question that the reduced educational attainment discerned by the district court in 1984 resulted from acts of racial discrimination." P.A. 63.

3. *Remedy.* The State's final effort to expand its questions presented beyond the issues actually involved in the decisions under review is its claim that these issues raise the "fundamental issue of the propriety of the ultimate remedial purpose." P.B. 18-19. Specifically, the State challenges the "system-wide" and allegedly "interdistrict" nature of the remedy. Inasmuch as these contentions rest principally on the State's challenge to the long-resolved factual findings about the harms caused by the violation, this Court should not address them because precisely the same legal issues have been litigated before in this case, and long since finally resolved against the State. The dissenters from the denial of rehearing *en banc* below emphasized that the goals of the remedy were well-settled and unquestioned. P.A. 63 ("I do not question those goals. The appropriate question now is, have some or all of the goals been met when the proper test is applied?").

The State's argument that any "system-wide" relief in this case is inappropriate, P.B. 9-10 n.9, 21, is not presented in its Petition, was not argued in the proceedings under review here, and has long since been finally resolved against the State. In 1985, the State initially opposed all districtwide relief in this case, claiming that such relief was not tailored to the scope of the violation: "In our view, the plaintiffs and the KCMSD failed to demonstrate that the existence of segregated conditions . . . caused particular harm to students in nonsegregated schools." Memorandum of the State of Missouri Regarding the Remedy Hearing and Alternate District-Wide Plan (filed April 29, 1985) at 1. However, the district court rejected

this view, finding explicitly that the constitutional violation had harmed students districtwide. J.A. 23.

The State also raised this argument in an early appeal challenging two of the *Milliken II* programs for which the district court had required it to pay the full cost. While the *en banc* Eighth Circuit agreed with the State that costs should be shared, it rejected the State's contention that the systemwide nature of the programs was excessive. *Jenkins,* 807 F.2d at 684-85. In a subsequent appeal, the State again raised precisely the same legal argument, claiming that magnet school programs that benefited non-minority students or minority students in integrated schools exceeded the scope of the violation. *Jenkins,* 855 F.2d at 1303-04. The Eighth Circuit rejected this argument on two grounds. First, it found that the systemwide improvements were not ordered as an end in themselves but "as a means . . . of restoring to the victims the education they have been denied" and of desegregating KCMSD student enrollments. *Id.* Second, the Court held that it was appropriate to order a systemwide remedy where all students had been "deprived" by a system that was inferior *because of* discrimination against African-Americans. *Id.* In unsuccessfully seeking *certiorari* in 1988 to review this decision, the State did not renew these arguments. Moreover, this Court has long made clear and recently reiterated that practices with a systemwide impact form "an appropriate basis for a systemwide remedy." *Freeman,* 112 S. Ct. at 1450 (quoting *Dayton II,* 443 U.S. at 534).

Prior to its Brief to this Court, the State has not complained that the *Milliken II* relief in this case was impermissibly "interdistrict" in its scope. Indeed, while it opposed the initial voluntary interdistrict transfer plan and magnet school proposals in the district court, the State itself *proposed* many of the basic *Milliken II* educational improvement programs in 1985. Even in these proceedings, the State stipulated to "the scope of the program as proposed" regarding the *Milliken II* remedies. J.A. 376.

The State should not be heard now by this Court to contest them as somehow impermissibly interdistrict or systemwide.

The State *has* complained before about the lower courts' use of the quality of education in suburban districts as a guide in developing the magnet school and capital improvement remedies, and about the goal of attracting suburban non-minority students back to the District. The Eighth Circuit explicitly rejected these contentions. *Jenkins,* 855 F.2d at 1302-03. The State raised precisely these same issues in its 1988 petition for a writ of *certiorari.* No. 88-1150, Petition at 12. The State claimed that the goals of the remedy were impermissibly "to make the Kansas City system comparable to the 'average . . . suburban district' " and to attract "more white students to the district." *Id.* This Court denied *certiorari* on these issues concerning capital improvements and the magnet school plan.[30]

Finally, the State also claims in this Court that the issue presented by the salary relief for non-instructional employees ordered by the lower courts is whether it is error to implement "an interdistrict remedy in an intradistrict case." P.B. i., 49. The salary orders below, however, have nothing to do with interdistrict issues and do not rest solely on a "desegregative attractiveness" rationale, P.B. 43. They are based on the broader findings (1) that adequate salaries are necessary to implement the remedy as a whole including the basic educational improvements, P.A. 87, and (2) that the State's constitutional violation had contributed to the District's inability

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[30] In any event, the magnet school plan, which is not before the Court, is not "interdistrict" relief as the State suggests. P.B. 30 n.20. The magnet schools in the KCMSD do not "pierce the territorial integrity of [suburban] school districts" at all, *id.*, but rely exclusively on the voluntary choices of families, white and black, about where their children should attend school. This is not an interdistrict remedy even remotely comparable to that rejected in *Milliken I.*

on its own to provide normal salaries. The salary relief was not ordered so much to attract white students as to prevent a mass exodus of qualified teachers and staff needed to implement the remedy.

B. The Salary Relief Ordered for Non-Instructional Personnel Is Based Firmly on Factual Determinations That Also Have Been Finally Resolved Against the State in Earlier Proceedings.

These Respondents concur in the position of the Jenkins Respondents that the findings of the district court and court of appeals that salary relief is necessary to support the desegregation plan should not be disturbed. We incorporate by reference the Brief of Respondents Jenkins *et al.* at pages 27-29.

CONCLUSION

It remains unclear just what the State asks this Court to do. In seeking *certiorari*, the State proclaimed that it does not "ask this Court to declare partial unitary status. Petitioners seek only correction of the erroneous legal standard applied below." Reply Memo at 8. At the end of its wide-ranging brief, however, the State concludes that the Court should "reverse" the orders below. P.B. 50. We cannot believe that the State intends that this Court could declare any part of the District "unitary" without further proceedings below, because such a process would be diametrically opposed to the procedures required by this Court in *Dowell* and *Freeman*. Unless that is what the State suggests, however, its request that the Court simply "reverse" the decisions below makes no sense.

For all of the reasons stated herein, the Petition should be dismissed as improvidently granted or, alternatively, the decision below affirmed.

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In The

Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI, *et al.*,

Petitioners,

v.

KALIMA JENKINS, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS JENKINS, *ET AL.*

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the lower courts, in a case of prolonged State-mandated racial segregation with devastating effects on the educational opportunities available to the plaintiff schoolchildren, acted within their discretion in refusing to terminate remedial educational improvement programs as "unitary" where they found that the defendant seeking termination had not shown (1) that the vestiges of segregation which such programs were designed to remedy had been eliminated to the extent practicable or (2) that release of jurisdiction in these areas would not have adverse consequences on other admittedly non-unitary aspects of the school system; and where there was no evidence (3) that the defendant seeking such termination had demonstrated a good faith commitment to its constitutional obligation.

2. Whether the lower courts acted within their discretion to extend orders mandating that the State defendants help maintain school district salaries for non-instructional personnel at levels repeatedly found necessary to successful implementation of a largely voluntary desegregation plan, where the deplorably low original salaries were in part the result of the State's constitutional violation affecting school district funding.

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BRIEF OF RESPONDENTS JENKINS, *ET AL.*

INTRODUCTION

Missouri[1] sought and secured certiorari on the propriety of extending two specific aspects of the desegregation remedy ordered below for the Kansas City, Missouri School District.[2] Missouri's brief devotes only a few

[1] Petitioners, individual officers of the State of Missouri, are referred to collectively as "Missouri" or "the State."

[2] The respondent superintendent and board members of the School District of Kansas City, Missouri, and the district itself, are referred to collectively as "KCMSD" or "the district." This brief is filed on behalf of the Jenkins Respondents, the plaintiff schoolchildren below.

pages to those issues. Reflecting the weakness of the argument on which Missouri relied in its certiorari petition, the remainder of its brief seeks review of a set of issues on which the Court has *not* granted certiorari and would be unwise to do so – namely, (1) ten-year-old fact findings of two courts below as to the violation and its effects (which Missouri never appealed to this Court), (2) the basic components of the remedy (which this Court declined to review five years ago), (3) the validity of the Court's doctrine governing school desegregation remedies reaching back to its second *Brown* decision,[3] and (4) whether to abandon the recently announced rule of *Freeman v. Pitts*, 112 S.Ct. 1430 (1992), governing when desegregation remedies should end. The respondent Kansas City schoolchildren demonstrate herein the propriety of the specific remedial orders on which certiorari *was* granted and the strong bases in the record before the Court for eschewing review of factual and legal questions on which certiorari was *not* granted.

COUNTERSTATEMENT OF THE CASE

A. Decisions Preceding the Orders at Issue

In 1984, the district court ruled that Missouri and the Kansas City, Missouri School District (KCMSD) intentionally segregated black and white public schoolchildren from the 1860s through the date of the court's order.[4] The

[3] *Brown v. Board of Education*, 349 U.S. 294 (1955).

[4] The KCMSD has 37,000 students and is primarily located in the City of Kansas City, Missouri. The district's boundaries

court found that defendants' violations (1) concentrated black children inside and white children outside the KCMSD, and (2) reduced educational attainment, first for KCMSD's black students and ultimately for all pupils in the district, resulting (as the district court later described it) in a "system wide reduction in student achievement."[5] Neither defendant appealed the district court's violation and effects findings.

The district court held the KCMSD and State defendants jointly and severally liable for remedying the constitutional violations. It ordered a desegregation plan that, to the extent practicable, would (1) " 'generate voluntary student transfers resulting in greater desegregation in the [KCMSD's] schools' " and (2) "improv[e] the educational lot of the victims of unconstitutional segregation." 855 F.2d at 1302, *quoting* district court Order of Nov. 12, 1986, at 3. After lengthy hearings, the district court found that a remedy capable of achieving these two goals required four components – educational improvements, magnet schools, capital improvements, and a

are not coterminous with those of the City, however, which contains thirteen school districts in whole or in part. The student enrollment of the KCMSD is 68.8% African-American; that of the other twelve districts in the City is predominately white. P.Exs.9, 36, 53G.

[5] The violation and effects findings are discussed *infra* pp. 14-21.

voluntary interdistrict transfer program.[6] J.A. at 61-80, 86-92.[7] The court of appeals affirmed. 807 F.2d at 684-686.

While portions of the educational improvements plan were implemented in 1985, the full complement of magnet schools was not operating in all grades until September 1994. In 1993, the district court found that the plan had achieved "substantial progress toward desegregating the schools" in the KCMSD, and that the "evidence is clear that there has been a trend of improvement in the academic achievement in the KCMSD."[8] Pet.A. at 129, 131. Based on this progress, the

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[6] The findings that the nature and scope of the violation dictated the remedy's desegregative and educational improvement goals and that those goals dictated the four components of the remedy are discussed *infra* pp. 7-21.

[7] The Joint Appendix is cited as J.A. at ___; the petition for a writ of certiorari as Pet. at ___; the appendix to the petition for a writ of certiorari is cited as Pet.A. at ___; and petitioners' brief as Pet.Brf. at ___.

[8] Between 1955 and 1984, the average yearly increase in the proportion of black students in the KCMSD was 1.7 percentage points (total increase was 48.8 percentage points), with yearly increases of 2 and even 3 percentage points being common in the decade and a half before the liability finding. Ex.K2. During the 10 years that the desegregation plan has been in effect, the yearly increase has been one-tenth of a percentage point (total increase, 1.1%) due mainly to hundreds of white students whom the plan has attracted into the district's schools. KCMSD Ex.39 (Jan. 27, 1993); KCMSD Ex.102 (Feb. 26, 1993). The district court based its finding that the remedy is improving academic attainment within the KCMSD on evidence of student progress and accomplishments in reading, math, science, foreign language fluency, engineering and agribusiness programs, and the arts. KCMSD Exs.28A-B, Tr. at 606 (Jan. 27, 1993); Tr. at 134-250 (Jan. 25, 1993); Tr. at 514-556 (Jan. 26, 1993); Tr. at 948-1035 (Jan. 28, 1993); Tr. at 1492-1535 (Feb. 2, 1993).

court ordered the parties to begin planning for the orderly termination of the judicial remedy, J.A. at 140-41, though none of the defendants had (or has since) filed a motion for full or partial "unitary status".

B. Findings Supporting the Orders at Issue

Since 1985, the district court has conducted periodic reviews (usually, at two-year intervals) of various components of the remedy. In 1992, following hearings on two such periodic reviews, the district court ordered the continuation of two aspects of the remedy – the educational improvement plan as a whole and the salary supplement aspect of that plan.[9] Pet.A at 69, 76.

The court of appeals affirmed the one-year continuation of the educational improvement programs because Missouri had not met, or even attempted to meet, its burden under *Freeman v. Pitts*, 112 S.Ct. 1430 (1992), of proving partial unitary status with regard to those programs. Pet.A. at 19. In affirming, the court of appeals rejected Missouri's contentions for three reasons: (1) Missouri presented no evidence either demonstrating the extent to which the educational improvement "programs had succeeded in improving student achievement" or establishing the State's good faith implementation of the remedy. Pet.A. at 21. (2) Consequently, the "record fell far short of establishing" that the educational-harm effects of

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[9] In 1987, the district court ordered that the salaries of certain district employees be supplemented to an extent necessary to implement the educational improvement programs. J.A. at 235.

the violation had been eliminated to the extent practicable and that termination was otherwise appropriate under *Freeman*. *Id.* at 19. (3) Contrary to Missouri's claim, the sole criterion for deciding whether to continue the educational improvements plan was not whether all parts of the plan had begun operating, but rather the factors set out in *Freeman*. *Id.* at 18-19. In some "further words," the court of appeals said that the "success of quality of education programs must be measured by their effect on the students" whose educational attainment had been diminished by the defendants' unlawful racial segregation, but left the district court following a hearing to determine how to analyze such effects. *Id.* at 21.

The district court evaluated the request for a salary supplement extension under the rule that mandatory expenditures must " 'materially aid the success of the overall desegregation effort.' " Pet.A. at 87, *quoting Arthur v. Nyquist*, 712 F.2d 809, 813 (2d Cir. 1983). This test was satisfied, the court found, because "high quality personnel are [a] necessary" means to achieve the remedy's improved education and desegregation goals and because the 24%-plus drop in salaries that termination of the supplement would have caused would so "drastically impair the implementation of the desegregation plan" that the school district would be unable to "achieve the objectives of the desegregation plan." Pet.A. at 88, 91. The court of appeals affirmed because the district court had found as fact that the salary order was necessary to effectuate the educational improvement and magnet components of the remedy, which in turn were necessary to achieve the remedy's educational improvement and desegregation goals, and because Missouri made "no

claim" on appeal "that the findings of fact of the district court [were] clearly erroneous." *Id.* at 24-27.

C. Findings that the Remedy's Four Components Are Necessary to Achieve its Desegregation and Educational Improvement Goals

The preceding description of the time-limited extensions of the educational improvements plan and salary supplement exhausts the facts needed to address the issues on which the Court granted certiorari, namely, whether those extensions were within the lower courts' discretion. Missouri devotes only a handful of pages in its brief to these issues. Many additional pages are spent on the question whether the four components of the remedy (educational improvements, magnet schools, capital improvements, and voluntary interdistrict transfers) are proper means of achieving the remedy's desegregation and educational improvement goals.[10] This Court has previously denied review of the lower courts' orders implementing this basic remedial design, 490 U.S. 1034 (1989), and it has not directed the parties to the present proceeding to address questions other than those presented by the Petition. Because Missouri inaccurately portrays the record relating to the remedy's basic components, we here describe the findings supporting the prior determinations below that each of the four components is necessary and appropriate to redress the

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[10] *See* Petitioners' Brief at 21 (challenging the educational improvements programs); *id.* at 30 (challenging the magnet schools component); *id.* at 11-12 (capital improvements component); *id.* at 28, 31 (voluntary transfer program).

dual harms flowing from the constitutional violations: (1) segregation of black schoolchildren within the KCMSD (ultimately contributing to the increasing predominance of black pupils in the district's total enrollment), and (2) the accompanying discriminatory denial to these children of even adequate, much less equal, education (ultimately resulting in a system-wide reduction in educational attainment within the district).[11]

1. Many of the educational improvement programs that Missouri now challenges were adopted at Missouri's request in 1985. "[T]he State of Missouri . . . endorse[d] achieving AAA status, reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs." J.A. at 61. Missouri "proposed [these] program components" with the specific goal of "increas[ing] student achievement." J.A. at 59. Missouri contended that a plan should have as its first goal "the creation of a unitary school district through maximum desegregation and through improvement of academic achievement," and claimed that its proposals were best suited to remove the "deep-rooted educational disadvantages within the KCMSD" by fostering "improved academic achievement." Doc. 1074 at 2, 5-6.

The district court included six programs in its educational improvements plan based on their demonstrated capacity to "be effective in the real world." J.A. at 101. (a) The court adopted an "effective schools" instructional

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[11] The fact findings and evidence establishing these dual harms are discussed *infra* pp.14-21.

program because it had "shown significant promise as a means of remedying many of the educational problems which go hand in hand with racially isolated minority student populations." J.A. at 59. *See* J.A. at 60 (crediting Missouri's expert testimony that "effective schools" programs had "proven successful in [other] school districts undergoing desegregation"). (b) The district court agreed with Missouri and its expert witnesses that a class size reduction program was "an essential part of any plan to remedy the vestiges of segregation in the KCMSD." J.A. at 67. (c) The court adopted a summer school program based on Missouri's expert testimony that the program was an "important component in an overall desegregation plan" to improve "the academic achievement of students within KCMSD." J.A. at 71. (d) The district court adopted Missouri's "carefully defined and comprehensive" early childhood development program based on expert testimony that "early language development program[s]" in desegregation plans in other cities had proved to be a "keystone" to the "successful academic achievement" needed to overcome the educational vestiges of state-sponsored segregation. J.A. at 74. Finally, the district court agreed with Missouri that the plan should include (e) full day kindergarten and (f) after-school tutoring programs, finding that such programs had been effective in other desegregation plans and would both "provide remediation to those who are victims of past segregation" and attract nonminorities to "integrative experiences at an early age." J.A. at 72-73. The court of appeals affirmed. 807 F.2d at 684-686. This Court denied certiorari. 484 U.S. 816 (1987).

2. To overcome the racial isolation effects of the violation, the court adopted a program of magnet schools. The magnet plan relies upon parental and student choices among educational programs to "redistribute the students within the KCMSD to achieve the maximum desegregation possible" while also "regain[ing] some portion of the white students" that the violation had concentrated outside of the district. 855 F.2d at 1302. The court chose voluntary measures because magnet schools had proved to be "valuable and effective techniques" for reducing racial isolation in desegregation plans across the country and because "[t]he evidence is clear [that] mandatory student reassignment at this time will only serve to increase the instability of the KCMSD and reduce the potential for desegregation." J.A. at 78, 86. Noting Missouri's preference for mandatory busing, the district court set aside $175,000 for a study of the extent to which additional busing could alleviate the need for magnet schools and invited Missouri, based on the study, to file a motion to substitute busing for magnets. J.A. at 86. Missouri never filed a motion.

Missouri did not object to the district court's order requiring submission of magnet school plans, and its expert witnesses testified that the assignment patterns magnet schools would replace "clearly make neither administrative nor pedagogical sense." Tr. at 423 (June 5, 1986) (Dr. Denis P. Doyle). The State proposed no magnet plan of its own, and its witnesses supported the use of magnet schools to achieve voluntary desegregation. *Id.* at 425. Finding that magnet schools are an "integral part of the district-wide [plan] for improved achievement" and

are necessary to "assist in expanding the desegregative education experience for KCMSD students," the district court ordered implementation of a six-school pilot program and directed the defendants to propose an expanded program. J.A. at 118.

Missouri again proposed no magnet plan. Tr. at 822 (Sept. 18, 1986). At a lengthy hearing on KCMSD's proposal, Missouri's expert witness testified that: magnet schools are "an appropriate approach to reduce minority concentration" in KCMSD; the capacity of the KCMSD plan to increase desegregation in the district through voluntary participation of white children from private schools and surrounding districts was "an attractive" feature; and the district-wide nature of the plan avoided an inequitable aspect of magnet plans operating elsewhere, because no black children would be forcibly displaced from newly "magnetized" and desegregated schools to segregated neighborhood schools. *Id.* at 803-806 (Dr. Doyle). The district court ordered implementation of KCMSD's proposal because the magnet themes were "carefully chosen," the plan "would generate voluntary student transfers" from inside and outside the district "resulting in greater desegregation," and the plan assured equitable treatment of KCMSD's minority children. J.A. at 130-132. The court of appeals affirmed. 855 F.2d at 1303-04. This Court denied certiorari. 490 U.S. 1034 (1989).

3. The district court found that, as a consequence of the defendant's violations and their financial effects, the KCMSD's schools had "literally rotted," "adversely

affect[ing] the learning environment and serv[ing] to discourage [white] parents who might otherwise enroll their children in the KCMSD."[12] J.A. at 219, 237. To cure the resulting racial isolation and reduction in achievement, the district court ordered capital improvements. "The improvement of school facilities," the court found,

> is an important factor in the overall success of this desegregation plan. Specifically, a school facility which presents safety and health hazards to its students and faculty serves both as an obstacle to education as well as to maintaining and attracting non-minority enrollment. Further, conditions which impede the creation of good learning climate, such as heating deficiencies and leaking roofs, reduce effectiveness of the quality education components contained in this plan.

J.A. at 89. The court of appeals affirmed. 855 F.2d at 1306 (the "findings of the district court demonstrate that the capital improvements program is essential to assure the quality of education and future success of the magnet

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[12] Based on hundreds of hours of testimony, the district court found that the effects of the violations included economic strangulation of the district and, as a result, crumbling infrastructure; peeling paint and plaster; foul odors from rotted, corroded, and unventilated restrooms; roof leaks; broken windows; extremes of heat and cold; deteriorated playground equipment over hard play surfaces; noisy classrooms with no or deteriorated acoustical treatment; inadequate lighting; insufficient classroom, library, and cafeteria space; and faulty electrical and fire safety systems. J.A. at 89, 219. These conditions, the court found, created serious health and safety risks and educational impediments for children and staff. J.A. at 91.

schools necessary to remedy the constitutional violations in the KCMSD"). This Court denied certiorari. 490 U.S. 1034 (1989).

4. Based on findings that the State and city district, but not the suburban districts, had intentionally concentrated black children inside the KCMSD and white children outside the district, the district court concluded that the "nature and scope of the violation" did not justify requiring the suburban school districts to participate in a "*mandatory* plan . . . beyond the boundary lines of the KCMSD." J.A. at 86 (emphasis in original). Because Missouri was responsible for unlawfully concentrating black children inside and white children outside the KCMSD, however, the district court ordered the State "actively [to] seek the cooperation of each school district [around the KCMSD] in a voluntary interdistrict transfer program" to educate willing black children from the KCMSD in suburban schools. J.A. at 87. *See* J.A. at 126. The court of appeals affirmed. 807 F.2d at 683-684 (district court properly concluded that the nature and scope of Missouri's violation obligated it to eliminate the segregative effects of its violations and justified an order to "fund the voluntary interdistrict transfer program for that purpose"). Since 1991, two suburban school districts have expressed an interest in participating in such a program. In 1990, Missouri began funding the transfer of ten (now twenty) children annually from the KCMSD to a single suburban district. In 1993, the district court rejected as too expensive a proposal by the plaintiff schoolchildren to fund additional transfers to another district. The court of appeals affirmed. No. 94-1405 (8th Cir. Oct. 13, 1994).

D. Findings that the Violation Segregated Blacks Within the KCMSD and Caused a System-wide Reduction in Educational Achievement in the District

Ranging further beyond the questions on which certiorari was granted, Missouri follows its attack on the remedy's four components as cures for the educational and segregative effects of its violation by questioning the existence of those effects. Because Missouri inaccurately describes the lower courts' findings – and omits mention of its failure to appeal those findings as clearly erroneous – this subsection sets out the relevant findings and procedural history. Evidentiary support for the findings is sampled in the text and footnotes.

1. Missouri "mandated segregated schools for black and white children before 1954" pursuant to state constitutional provisions that permitted and then required segregation of the races. J.A. at 19, *discussing* Mo. Const. 1865, art. 9, § 2; Mo. Const. 1875, art. 11, § 3. Only the largest, most urban districts in the state could afford to operate schools for black children.[13]

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[13] *See* P. Ex. 210 (Missouri Annual State School Report: "the isolation of colored children . . . under the dual system of education [creates] one of the most perplexing problems in school administration" – how to provide schools for black children "without taking a larger amount" of available funds "than would be right" from "the larger group"); *id.* ("There are not as many colored schools as there should be [because] some school boards . . . feel that these people should not be given a school if it can possibly be avoided"); P. Ex. 54A (Kansas City area school districts with black children omitted them from annual enumerations to avoid responsibility to educate them); Tr. at 3403-20

In order to obtain any education at all for their children, black families "moved out of districts which did not maintain the state-required schools [for blacks] . . . to districts, including the KCMSD, that provided black schools."[14] J.A. at 19. "[O]nce here [in the KCMSD], blacks settled in the inner city," where the district's "segregated facilities with segregated staffs . . . were located."[15] *Id.* at 21, 24.

Together with numerous other actions by state officials that continued into the 1970s and were "intended to cause housing segregation", Missouri's segregation of the schools "had the effect of placing the State's imprimatur on racial discrimination," "encouraged racial discrimination by private individuals in the real estate, banking and insurance industries," and "continues to have significant effect . . . in the Kansas City area."[16] J.A. at 46. As a direct

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(only 6 of 61 black communities in the three Missouri counties surrounding Kansas City had schools for blacks at any time between World War I and 1954).

[14] *See* P. Exs. 182, 184, 210 (Missouri Annual State School Reports: "lack of school facilities" creates "desire on part of negroes to move to larger cities"); P. Ex. 53E (between 1910 and 1954, the black population of the three counties around Kansas City declined 62%, 77%, and 82%, respectively; the black population of the City increased 177%).

[15] *See, e.g.*, Tr. at 19259 (testimony of Missouri's expert demographer that creation of "core of blacks" in southeastern Kansas City had "longstanding effects because . . . in-migration [of blacks] tends to focus on the black core"); Tr. at 4444, 14782; P. Ex. 3003A.

[16] *See* Tr. at 13024-35, *cited*, J.A. at 21 (state's enforcement of housing segregation requirements until 1953 resulted in "rapid migration of blacks to [the southeast Kansas City] area

consequence, the district court found, "the public schools [in the KCMSD] . . . swell[ed] in black enrollment" and "whites moved out" of the district to the suburbs.[17] J.A. at 21, 28. The "intensity" of the resulting "segregation is demonstrated by the fact that the average black family [in 1984 in the Kansas City area] lives in a census tract that is 85% black while the average white family lives in a census tract that is 99% white." J.A. at 20-21.

The Missouri Constitution continued to require segregated schools until 1976, J.A. at 19, and the sum total of

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and . . . rapid outmigration of whites"); Tr. at 13043, *cited*, J.A. at 21 (Missouri Real Estate Board's suspension of license of realtor for "introducing blacks into white neighborhoods"); J.A. at 21 (dual housing market "still exist[ed] to a large degree" in 1984); *id.* at 35 (pursuant to actions of two state relocation agencies during the 1950s-1970s, "blacks were being located primarily in the southeast part of Kansas City while whites were relocated throughout the Kansas City area"); Tr. at 12008-9, *cited*, J.A. at 21 (between 1953 and 1973, the two relocation agencies used realtors serving only either white families buying in white neighborhoods or black families buying in black neighborhoods to relocate 5,000 black and 8,000 white households); Tr. at 11267-68 ("the vast majority of [relocated] blacks [ended up] within the Kansas City School District and the vast majority of whites [ended up] outside the school district . . . in every direction"); P.Ex. 2659 (HUD finding that "racial discrimination practiced in [state urban renewal agency's] relocation programs" was "blatant and flagrant"). J.A. 46 (actions of Missouri housing agencies are partly responsible for the fact that "a large percentage of whites do not want blacks to reside in their neighborhood and a large percentage of blacks do not want to reside in a neighborhood in which they are not wanted").

[17] *See, e.g.*, Tr. at 8715-16, 8721-30, 9228-32, 9234, *cited*, J.A. at 28.

the State's formal response to *Brown v. Board of Education*, 347 U.S. 483 (1954), in the intervening years, was an Attorney General's opinion stating that, if local districts wanted to, they could permit black and white children to attend school together. P.Ex.2322. "[T]he State as a collective agency . . . fail[ed] to affirmatively act to eliminate the structure and effects of its past dual system on the basis of restrictive state law."[18] J.A. at 50.

The district court found in 1984 that the KCMSD "has not entirely dismantled the dual school system." J.A. at 25. *See id.* (schools that were all-black in 1954 remained all-black, many schools that had been predominately white remained so); Ex.K2. In the 30 years after *Brown*, KCMSD's actions "were ineffective in integrating its schools" and eventually had the opposite effect. J.A. at 24. By adopting attendance, curriculum, and personnel policies that assured that KCMSD's schools were either educationally preferable white schools, educationally inferior all-black schools, or in rapid transition from the former to the latter, KCMSD caused white families to flee presumptively inferior schools with even small proportions of black students, eventually causing "white flight from the KCMSD to suburban districts" and private schools involving "a large number of students." J.A. at 126.

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[18] *See, e.g.*, P.Exs. 496, 504; Tr.4187-91, 6096-6104 (in post-*Brown* years, State repeatedly rejected measures to reorganize school district boundaries to enhance racial integration and to permit voluntary interdistrict transfers of students to achieve desegregation); Tr.17410-17, 17429-32 (after 1954, Missouri never required a school district to desegregate, never monitored extent of segregation in schools, and never enforced Title VI in schools with respect to race).

In particular, the KCMSD, with at least tacit state approval, acted affirmatively to maintain and extend segregated schools between 1954 and 1984. *See, e.g., id.* at 23-28 (after *Brown* and through 1970's, KCMSD "chose to operate some completely segregated schools" and a few integrated schools in racially transitional areas); Stipulation 12, 39, 42, 43, 48 (during same time period, KCMSD adopted hundreds of attendance boundary changes that removed white neighborhoods from attendance areas of otherwise integrated schools and attached them to adjacent, all-white school attendance areas); J.A. at 25 (KCMSD's transfer policies permitted "whites living in racially transitional neighborhoods to transfer . . . to whiter schools"); *id.* at 26 (KCMSD's insistence that attendance zones never cross Troost Avenue, a traditional dividing line between white and black residential neighborhoods, caused east-of-Troost schools to remain all-black or to change rapidly from all-white to all-black, while west-of-Troost schools remained all-white); *id.* at 27 (in 1960s KCMSD relieved overcrowding at predominantly black schools by "bus[ing] entire classrooms of black students to predominantly white schools but ke[eping] them as an insular group" that was educated in separate classrooms and assigned to a separate lunch period, "not allowing them to be mixed with the receiving population").

At the same time, KCMSD sought to preserve superior educational opportunities for white students for as long as possible while maintaining and exacerbating inferior conditions at predominantly black schools. *See, e.g.*, J.A. at 27 (for many years, KCMSD's elementary schools with mostly or all-black enrollments were consistently

overcrowded while predominantly white schools in neighboring areas were consistently underutilized); Tr. at 3298-09, 3304-06 (KCMSD assigned least experienced teachers to black schools, while more experienced teachers were assigned to white schools); Tr. at 7018-21, 7338-41, 8264-65, 8969-71, 9419-20; Stipulation 75 (as high schools' enrollments changed from predominantly white to integrated, and then to predominantly black, KCMSD moved college preparatory courses to white schools, replacing them with vocational offerings such as "janitorial services").

The effect of the district's maintenance of a decreasing number of educationally superior white schools and an increasing number of educationally inferior black schools was to cause white families to flee even the district's few modestly integrated schools. *See, e.g.*, Tr. at 5117-18, 6856-57, 6989-70, 7104-08, 7305-20, 14785-86, 15144-50; P. Ex. 1775B-E (schools in southeast corridor east of Troost with increasing black enrollments were, and were perceived by parents to be, educationally inferior, prompting white flight to suburbs); Tr. at 6907-08 (white parents complaining about curricular changes in integrated schools were told to move to suburbs if they were dissatisfied with district's policies); J.A. at 25-28 (attendance zone adjustments, transfer policies, and similarity of attendance zone configurations to racially segregated neighborhoods caused KCMSD's "attendance patterns to continue on a segregated basis" and eventually led whites to "move[ ] out" of the district); P. Ex. 1,

6-9; Ex. K1, K2; Tr. at 3311-12, 7022-24, 9358-66, 10384-86, 15140-42.[19]

Neither Missouri nor the KCMSD appealed the findings that they segregated schools and housing in the Kansas City area from 1865 to 1984 and that their violations concentrated black children inside and white children outside the KCMSD.

2. The district court found that "the inferior education indigenous of the state-compelled dual school system has lingering effects in the [KCMSD]". J.A. at 23. As a result of the defendants' unlawful maintenance of segregation long after *Brown*, KCMSD's schools were characterized by the low achievement of their pupils, which limited employment opportunities, generated feelings of inferiority, reduced aspirations, and thus perpetuated in later generations conditions that impeded effective educational attainment for most of Kansas City's black students. Tr. at 1862-2019 (cited in J.A. at 23), 16414, 16421-22, 16429, 16457-58 (cited in J.A. at 23), 22591-92. "Several witnesses confirmed the conclusion . . . that forced segregation ruins attitudes . . . [,] produces low achievement . . . [and] ultimately limits employment

[19] The district court considered and "rejected" extensive testimony by Missouri's experts that neutral factors such as "economics, accessibility to jobs, spatial barriers, personal preference and private discrimination," and not Missouri's and the KCMSD's intentional segregation, had caused the racial segregation of schools between KCMSD and its neighbors. J.A. at 21. "[I]n the context of Missouri's legacy" of intentional school segregation, the court found, the evidence demonstrated the "influence of [segregated] schools in housing patterns." *Id.*

opportunities and causes poverty."[20] J.A. at 23 (record citations omitted).

The district court found that segregation also had "detrimental effects . . . on this school district's ability to raise adequate resources" during the 1960s-1980s. J. A. at 91. *Accord* J.A. at 133. These financial effects of the violation resulted, in turn, in deteriorated school conditions that "adversely affect the learning environment", creating an additional "obstacle to education". J.A. at 88-89. Overall, the violation and its financial effects on the KCMSD produced a "system-wide reduction in student achievement." J.A. at 58.

In rejecting Missouri's appeal of orders implementing the remedy, the court of appeals found "support in the record for the [district] court's findings that segregation and the failure to remove the vestiges of the dual school system contributed to the atmosphere preventing KCMSD from raising necessary funds." 855 F.2d at 1305. A review of the record also convinced the court of appeals that the "vestiges of unconstitutional segregation" in the KCMSD included the " 'inferior education' " available to the district's students and a consequent " 'system-wide reduction in achievement' ". *Id.* at 1300. This Court denied certiorari. 490 U.S. 1034 (1989).

SUMMARY OF ARGUMENT

The Court granted certiorari to consider two specific issues arising from the district court's periodic review of

[20] *See, e.g.*, Tr. at 1862-2019, 2453-56, 16,393-470, 16,573, *cited*, J.A. at 23; Tr. at 525-51, 1324-40.

components of its remedy for state-mandated segregation in the KCMSD. Those orders are based on findings of fact that Missouri does not challenge as erroneous; they conform to this Court's doctrines governing termination of school desegregation remedies; and they do not involve an abuse of discretion. For these reasons, and because the orders are contributing to the elimination to the extent practicable of the vestiges of unlawful segregation – and, particularly, because Missouri has not even tried to prove the contrary – the orders should be affirmed.

Evidently realizing that the record below fully supports the orders that, alone, are addressed in the questions on which certiorari was granted, Missouri has filed a brief that impermissibly seeks to substitute different, and far broader, questions for review – *e.g.*, the propriety of the four basic components of the remedy ordered and affirmed below (which this Court declined to review five years ago) and the sufficiency of the evidentiary support for the lower courts' violation and effects findings (which Missouri never appealed when the findings were made seven to ten years ago).

This Court wisely has not undertaken to review the broader propositions proffered by Missouri, because acceptance of those propositions, on the record actually before the Court, would require it to abandon or drastically constrict the basic remedial principles that have guided the Court's desegregation jurisprudence since *Brown II*, 349 U.S. 294 (1955). Missouri, for example, challenges the notion that educational improvements have a place in desegregation remedies, though this Court has repeatedly approved such programs. *See, e.g., Freeman v. Pitts*, 112 S.Ct. 1430, 1443 (1992) *(Freeman); Milliken v.*

Bradley, 433 U.S. 267, 287 (1977) *(Milliken II)*. *See also Brown II*, 349 U.S. at 301. Missouri asks the Court to stop measuring equitable remedies by their effectiveness, though that has been the measure in school desegregation cases since *Brown II*, 349 U.S. at 300. *Accord e.g., Freeman*, 112 S.Ct. at 1446; *Dayton Board of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979) *(Dayton II); Green v. County School Bd.*, 391 U.S. 430, 437 (1968) *(Green)*. Missouri advocates restrictions on the remedy that would amount to a retreat from the established principle that the nature and scope of the remedy must carefully track the nature and scope of the actual violation. *See e.g., Hills v. Gautreaux*, 425 U.S. 284, 294 (1976) *(Gautreaux)*; *Milliken v. Bradley*, 418 U.S. 717, 744 (1974) *(Milliken I)*. And Missouri calls on the Court to withdraw the remedial discretion of lower courts, and to forsake the deference to the lower courts' fact findings, that have long been hallmarks of the Court's approach to school desegregation and other equitable questions. *See, e.g., Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455 (1979) *(Columbus)*; *Brown II*, 349 U.S. at 300.

As the KCMSD demonstrates in its brief, Missouri's attempted broadening of the questions presented is impermissible. As the schoolchildren demonstrate below, the lower courts – relying on findings that are not challenged here – have consistently stayed well within the bounds of this Court's settled jurisprudence in designing a remedy to match the nature and scope of the violations and their effects. The record in this case does not present the issues with which Missouri seeks to burden the Court and in no way supports the sweeping reexamination of the foundations of school desegregation doctrine that

would be required to credit the challenges Missouri makes to the remedy ordered below.

ARGUMENT

I. THE COURT OF APPEALS PROPERLY APPLIED *FREEMAN* IN RENEWING THE TWO CHALLENGED ASPECTS OF THE DESEGREGATION REMEDY

In the two questions on which certiorari was granted, Missouri asserts that the courts below erred (1) by insisting upon proof of the effectiveness of the educational improvement programs before terminating them and by assertedly making "test scores" the measure of effectiveness, and (2) by ordering salary supplements for non-instructional personnel that do not "relate to the constitutional violation." Pet. at i. The court of appeals, however, appropriately applied *Freeman* in determining that the remedial programs should achieve some (but *not* a "test scores") measure of success before being terminated and that the evidence "fell far short of establishing that [the] vestiges" of segregation had been eliminated to the extent practicable. Pet.A. at 19. And the court of appeals properly affirmed the specific findings of fact that compelled the district court, applying *Freeman*, to maintain salary adjustments that served "in a feasible and practicable way to . . . redress the injuries caused by unlawful action." *Id.* at 23 (*quoting Freeman*, 112 S. Ct. at 1444). The lower courts thus properly rejected Missouri's arguments because Missouri did not meet (or even attempt to meet)

its burden of proving in the district court that the educational improvements programs had achieved their remedial goal or its burden of proving on appeal that the fact findings compelling the salary supplement extension were clearly erroneous.

A. Missouri Did Not Establish that the Educational Programs Met the *Freeman* Standard for Termination

In seeking to end implementation of the educational improvement programs, Missouri did not even try to meet its burden under *Freeman*. It presented no evidence on whether the vestiges of segregation had been eliminated to the extent practicable nor any evidence of its good faith. Instead, Missouri claimed simply that the programs had been established and that they were fully operational. Pet.A. at 18. The court of appeals accordingly rejected Missouri's request to terminate the educational programs for lack of the proof of practicable effectiveness and good faith that *Freeman* requires, *see*, 112 S.Ct. at 1444, and affirmed the renewal of the programs for one additional year. Pet.A. at 19-21. As the Brief of KCMSD, at 9-17, demonstrates, the court of appeals' order added nothing new to the longstanding equitable requirement that remedial programs eliminate to the extent practicable the vestiges of the violations (here, the violations' demonstrated educational effects and harms on schoolchildren); the court of appeals did not impose any particular measures of that effectiveness, leaving those measures to the parties (including Missouri) to propose and the district court to adopt and apply; and the court of appeals most certainly did not impose "test scores" as the measure (nor even use those words or any reasonable facsimile).

Moreover, as is demonstrated by the Brief of Amici Curiae James Anderson, et al., Appendix at 4-14 (Social Scientists' Statement), once it has been determined – as it has been here – that the plaintiff schoolchildren suffer under a system of "inferior education" caused by unlawful racial segregation, resulting in a system-wide "reduction in achievement", J.A. at 23, 58, educational improvement programs *can* achieve (and in other desegregation plans *have* achieved) measurable progress in eliminating the educational-harm vestiges of the violation.

As the Social Scientists' Statement further reveals, assessing progress in eliminating educational vestiges need not, and should not, rely on any particular measure of educational outputs, and instead can and should draw upon a wide variety of indicators, including "inputs", such as the number of teachers, their training, their attitudes and expectations, books, equipment, supplies, conditions of the schools, and the curriculum, as well as "outcomes", such as attendance, discipline and suspension data, graduation rates, grades, admission to college or post-high school technical training, and post-high school success in finding employment. Brief of Amici Curiae James Anderson, et al., Appendix at 14-19. That *all* the parties to this litigation agree that test scores should *not* be the sole or a determinative criterion by which the effectiveness of educational programs should be measured assures that the bogey Missouri conjures up out of its imagination – namely, that there is some sort of constitutionally mandated minimum test score requirement for children in desegregating schools – simply has no basis in the record of this case.

B. The Salary Supplements Ordered for Non-Instructional Personnel Are Necessary to Effectuate the Remedy and Are Compelled by Fact Findings Not Challenged by Missouri

Missouri also argues that this Court should overturn the district court's 1992 and 1993 salary orders, insofar as they include funding for the salaries of non-instructional personnel, because they allegedly do not cure a condition that was directly caused by the State's constitutional violation. Pet.Brf. at 42. The district court's orders, however, are supported by findings of fact and substantial record evidence demonstrating that salaries near market levels are necessary to allow KCMSD to implement the desegregation remedy and that the district's inability to produce revenue sufficient to fund its basic operations (including salaries) was indeed caused in part by Missouri's constitutional violation.

Desegregation funding for an increment of KCMSD salaries has been a longstanding component of the desegregation remedy that the lower courts have found to be necessary to remedy the constitutional violations in this case and that the State has not until recently chosen to appeal. The district court first ordered such relief in 1987. J.A. at 234-35. Although Missouri appealed other aspects of the same order, it did not challenge the court's approval of desegregation funds to bolster KCMSD's ability to attract and retain qualified employees to implement the court-ordered plan. In approving a consensual settlement continuing such relief in 1990, the district court again found, based on the evidence submitted during

four days of testimony prior to the settlement, that maintaining adequate salaries was "essential to comply with the court's desegregation orders." J.A. at 336. Again in 1992, after a four-day hearing, the district court found that without continuing salary relief, KCMSD would "not be able to implement" the desegregation plan. Pet.A. at 86. On appeal, "[t]he State [made] no claims that the district court's findings of fact [were] clearly erroneous," Pet.A. at 23, and the court of appeals affirmed. Pet.A. at 26-27. Again in 1993, the district court took extensive evidence and again concluded that salary relief was "a necessary component of the desegregation program." Pet.A. at 97. The court of appeals again affirmed this finding. Pet.A. at 31.

Missouri claims there is no "legal basis" for allowing desegregation funds to be used to pay salaries for "non-instructional personnel." Pet.Brf. at 42, 49. Missouri entirely ignores two fully sufficient legal bases for such relief, however, and the unchallenged fact findings that make both legal bases determinative here. First, desegregation (like other equitable remedies) requires utilization of ancillary measures that are necessary and proper to assure the effectiveness of the remedy's core programs. *E.g., Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978), *citing Milliken II*, 433 U.S. at 281. Moreover, in the series of orders cited above, dating back to 1987, the two courts below have found as fact that salary supplements *are* necessary to the effective implementation of the plan to remedy the "vestiges of segregation." Pet.A. at 23. Missouri's objection thus boils down to one of two equally untenable propositions – that desegregation remedies may justifiably be eviscerated by withholding ancillary

procedures that are absolutely critical to the remedies' effectiveness *or* that the Court (for no reason shown by Missouri) should ignore the fact findings of two courts below that the non-instructional salary supplements are precisely that critical.

Second, as Missouri concedes, remedial components are permissible, or even required, when they relieve conditions (here the vastly below market salary levels in the KCMSD) that "flow from [a] constitutional violation by the State". Pet.Brf. at 42. What Missouri fails to acknowledge is that the lower courts here *did* find that KCMSD's inability to produce adequate revenue to support its basic operations (including adequate salaries) was caused in part by Missouri's constitutional violation. Pet.A. at 26, 30. *Accord* 855 F.2d at 1305. Even the dissenters from the denial of rehearing *en banc* in the court of appeals recognized that the precipitous decline in local revenues in the KCMSD was "at least in part . . . [a] consequence of the *de jure* segregation." Pet.A. at 51. For these reasons, Missouri's attack on the salary relief ordered for non-instructional personnel should be rejected.

C. The Lower Courts' Focus, *Inter Alia*, on Whether Missouri Demonstrated the Effectiveness of the Two Aspects of the Remedy that it Sought to Terminate Is Wholly Consistent With Longstanding Case Law

Following well-established law, the lower courts reviewed Missouri's proposal to terminate the two aspects of the remedy at issue here under an effectiveness standard. The continuation of the educational programs

was measured in part by whether Missouri had demonstrated the programs' "effect on [the] students" harmed by the violation, Pet.A. at 21, and the salary supplements were measured by whether or not they remained necessary to the effective implementation of the remedial programs. Pet.A. at 88. These standards applied below thus scrupulously conformed to the Court's time-honored admonition to district courts that their remedies be effective to a practical extent. In *Brown II*, the Court required that remedies dismantle segregation in a "systematic and effective manner." *Brown II*, 349 U.S. at 300. In *Green*, the Court held that the obligation of lower courts, "as it always has been, is to assess the effectiveness" of desegregation plans. *Green*, 391 U.S. at 439. The Court reiterated in *Swann v. Charlotte-Mecklenberg Bd. of Ed.*, 402 U.S. 1 (1971) (*Swann*), that proven constitutional violators must " 'take whatever steps might be necessary' " to eliminate discrimination, *Swann*, 402 U.S. at 15 (*quoting Green*, 391 U.S. at 437-438), and, in the case accompanying *Swann*, said that the "measure of any desegregation plan is its effectiveness," *Davis v. Board of Sch. Comm'rs*, 402 U.S. 33, 37 (1971). And in *Dayton II*, the Court held that the "measure of post-*Brown I* conduct . . . is the effectiveness, not the purpose," of actions in eliminating the vestiges of state-sponsored segregation. *Dayton II*, 443 U.S. at 538. *Dowell* and *Freeman* continue this legacy, requiring proof by the party seeking to end all or part of a remedy that vestiges of past discrimination have been "eliminated to the extent practicable," *Board of Ed. of Oklahoma City v. Dowell*, 498 U.S. 237, 250 (1991), and that the wrongdoers have "take[n] all steps necessary to eliminate the vestiges" of prior discrimination. *Freeman*, 112 S.Ct. at 1443. Given the unchallenged findings of the two courts below that both aspects of the remedy at issue

here remain necessary to eliminate the educational harms that Missouri's violation has visited on the plaintiff schoolchildren and that those harms have not yet been eliminated to the degree practicable, the *Brown II – Freeman* line of cases requires affirmance.

II. THE MEANS THE DISTRICT COURT ADOPTED TO REMEDY THE EFFECTS OF THE CONSTITUTIONAL VIOLATION ARE WELL WITHIN THAT COURT'S AUTHORITY

The discussion in Part I exhausts the legal issues on which certiorari was granted. For the reasons set forth in the Brief of the KCMSD, at 40-49, the Court should reject Missouri's effort to use those issues as an ill-disguised pretext for reopening virtually every factual and legal issue that the remedy, and, indeed, the violation and its effects, might present but that have long since been resolved by the Court's denials of certiorari and by Missouri's failure to appeal. In the remainder of this brief, the plaintiff schoolchildren demonstrate the wisdom of the Court's eschewing review of the issues Missouri tries to smuggle into the case, given the clarity and workability of the Court's longstanding doctrine (which Missouri essentially asks the Court to abandon) and the extensive evidentiary support for, and the comprehensive nature of, the violation and effects findings (which Missouri effectively asks the Court to overturn).

A. Eliminating Educational Harms Caused by State-Sponsored Segregation Is an Appropriate Remedial Focus of a Desegregation Plan

In attacking the educational improvements component of the violation, Missouri suggests that the district

court should have limited its remedial attention to the six *Green* factors – student assignment, faculty, staff, transportation, extracurricular activities, and facilities. Pet.Brf. at 29, citing *Green*, 391 U.S. 430 (1968). Missouri's suggestion offends the Court's established school desegregation jurisprudence.[21]

This Court has never suggested that the *Green* factors represent a comprehensive list of the effects of school segregation that the remedy must seek to cure. Rather, in *Swann* and in later cases, the Court has repeatedly held that the scope of the remedy is determined by the nature and extent of the particular violation and its actual effects, and that district courts have a broad and flexible equitable discretion to fashion remedies. *Swann*, 402 U.S. at 15, 16.[22] *See, e.g., Washington State Fishing Vessel Ass'n v. United States*, 443 U.S. 658, 695-696 (1979). The need to match remedies to the infinite variety of violations and effects, and the chancellor's traditional equitable discretion, are inconsistent with Missouri's rigid understanding of the *Green* factors. For just these reasons, the Court has

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[21] It bears remembering that nearly all aspects of the remedy ordered below – the magnet and voluntary interdistrict plans for student assignments, the improvement of school facilities that "literally rotted" as a result of the violation, J.A. 237, and the upgrading of the quality of the faculty assigned to teach the schoolchildren victims of the violation – *are* encompassed by the six *Green* factors.

[22] "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann*, 402 U.S. at 15, *quoting Hecht v. Bowles*, 321 U.S. 321, 329-330 (1944).

explicitly refused to limit the range of effects of unconstitutional segregation that desegregation remedies must correct when feasible. In *Milliken II*, for example, this Court cited *United States v. Montgomery County Bd. of Ed.*, 395 U.S. 225 (1969),

> for the proposition that matters other than pupil assignment must on occasion be addressed by federal courts to eliminate the effects of prior segregation. Similarly, in *Swann* we reaffirmed the principle laid down in *Green v. County School Bd.*, 391 U.S. 430 (1968), that existing policy and practice with regard to faculty, staff, transportation, extracurricular activities and facilities were among the most important indicia of a segregated system. 402 U.S. at 18. *In a word, discriminatory student assignment policies can themselves manifest and breed other inequalities built into a dual system founded on racial discrimination. Federal courts need not, and cannot close their eyes to inequalities, shown by the record, which flow from a longstanding segregated system.*

Milliken II, 433 U.S. at 283 (emphasis added).[23]

Milliken II went even further, however, resolving precisely the question that Missouri tries to shoehorn into this case, though certiorari was not granted on it, namely, "whether a District Court can, as part of a desegregation decree, order compensatory or remedial education programs for schoolchildren who have been subject to past

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[23] The six *Green* factors cannot logically be understood to be exclusive. That they reach such relatively peripheral issues as "extracurricular activities" necessarily implies that they also reach more central issues such as the schools' *actual* curriculum and educational programs.

acts of *de jure* segregation." *Id.* at 269. Three well established principles dictated the Court's decisively affirmative answer to this question: (1) the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation; (2) the decree must be remedial in nature, *i.e.*, designed to restore the victims of discriminatory conduct to the position they would have occupied absent such conduct; and (3) the courts must take into account the practicalities of the situation and the interests of state and local authorities in managing their own affairs, consistent with the Constitution. *Id.* at 280-81.

Based on these principles, the *Milliken II* Court ruled that where, as here, the violation has caused demonstrable educational harms to the plaintiff schoolchildren – where, for example, "children . . . have been . . . educationally and culturally set apart from the larger community [and have] . . . acquire[d] habits of speech, conduct and attitudes reflecting their cultural isolation" – a remedy tailored to those harms is required. *Id.* at 287. The Court held that "[p]upil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent [educational] measures." 433 U.S. at 287-88. Faced with evidence of segregation-induced "reading and speech deficiencies" similar to, if not as extensive as, the harms found in this case, the Court recognized that such harms "cannot be eliminated by judicial fiat; they will require time, patience and the skills of specially trained teachers." *Id.* at 290. The Court, accordingly, approved programs that, *e.g.*, provided in-service training for teachers, guidance and counseling for

students, revised testing procedures, and remedial reading and communications skills programs. *See id.* at 775-760. Before and since *Milliken II*, scores of courts have ordered educational improvement programs to remedy the vestiges of segregation. *See, e.g., Parents for Quality Ed. with Integration, Inc. v. State of Indiana*, 977 F.2d 1207, 1211 (7th Cir. 1992); *Evans v. Buchanan*, 582 F.2d 750, 768 (3d Cir. 1978); *Tasby v. Black Coalition to Maximize Ed.*, 771 F.2d 849, 853 (5th Cir. 1985); *Oliver v. Kalamazoo Bd. of Ed.*, 640 F.2d 782, 787 (6th Cir. 1980); numerous decisions cited in *Milliken II* at 286.

B. The Harms Cured by the Educational Programs Here Are Causally Related to the Violation, and the Programs' Appropriateness Has Not Been Undermined By The Passage of Time

1. Citing *Dowell*, Missouri argues that the "passage of time since the original violation" undermines the "causal link" between the violation and existing educational conditions in the KCMSD." Pet.Brf. at 35, *citing Dowell*, 448 U.S. at 249. *Dowell* does not give Missouri the comfort it seeks. In *Dowell*, the Court simply noted that during the twenty-three years between the original finding of *de jure* segregation and the termination of the fully implemented decree, the "passage of time enable[d] the district court to observe the good faith of the school board in complying with the decree."

The situation here is entirely different. First, far from noting the good faith of the State in complying with the decree, the district court's observations have run in

entirely the opposite direction. *E.g.*, Pet.A. at 123 (Missouri "has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD"); J.A. at 136 (Missouri has not voluntarily taken one affirmative act "to aid a school district . . . involved in a desegregation program"). Missouri has not filed a motion for partial unitary status nor presented any evidence to show its good faith, notwithstanding that it has the burden of proof on unitary status. Second, the remedy in this case became fully operational exactly three *months* ago, not a score of years ago, as in *Dowell*. Third, as the district court found, Missouri's violation in this case was in full swing in 1984, *see supra* pp. 15-20, unlike the *Dowell* violation which ended in 1972. *Dowell*, 498 U.S. at 249. Finally, and most importantly, Missouri simply ignores the findings of both courts below that its violation so thoroughly crippled the KCMSD educationally and financially that a "system-wide reduction in student achievement" resulted, affecting every student in the district's "inferior" educational programs and its "literally rotted" buildings. J.A. at 23, 237. That those educational programs have only this school year been entirely replaced, and that some of those buildings remain under rehabilitation at this very moment, reveals the stark error in Missouri's attempt to antique the violation and its effects and also in Missouri's assertion that "[n]ot one of today's students has attended school in a *de jure* dual system," Pet.Brf. at 36.

2. Citing the Court's opinion in *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 416, 417 (1977) *(Dayton I)*, Missouri argues that plaintiffs have the burden of demonstrating the causal link between existing conditions and past *de*

jure segregation. Pet.Brf. at 34 and n.22. Missouri misstates the governing law. In *Columbus Bd. of Ed. v. Penick*, 443 U.S. 449 (1979), the Court held (as *Dayton I* itself had made clear) that *Dayton I's* "incremental segregative effects" requirement on which Missouri relies applies *only* when the effects of the violation were themselves merely incremental and *not* system-wide. "In *Dayton I*, only a few apparently isolated discriminatory practices had been found, yet a system-wide remedy had been imposed without proof of a system-wide impact." *Columbus*, 443 U.S. at 465-66. *Columbus*, *Dayton I*, and also *Dayton II* make clear that in cases, such as this one, in which a system-wide violation has been found, the "incremental segregative effects" standard is inapplicable. In such cases, if the proven wrongdoer seeks to change or end the remedy, that party bears the burden of showing that continuing conditions of the sort the system-wide violation was found to have caused are no longer the effect of the violation. *Dayton II*, 443 U.S. at 540-541; *Columbus*, 443 U.S. at 465-468; *Dayton I*, 433 U.S. at 420. Missouri did not appeal as clearly erroneous the district court's finding that the effects of the violation here were system-wide.

3. Missouri embarks on a long and confusing exegesis of the term "vestige" and of the degree to which existing conditions must be the product of the violation. Pet.Brf. at 33-35. Its argument is both factually and legally misguided. On the factual side, every effect of the violation that Missouri has been called upon to cure is a direct (and in most cases an actually intended) effect of the violation – including, racially segregated schools; inferior educational programs in the particular schools, and eventually, in the district in which African-American children

were unlawfully concentrated, a refusal on the part of most white parents and students to attend those inferior schools and, eventually, to remain in that systemically inferior district; and a refusal on the part of white taxpayers to support those schools and that district, with the result that the district's physical plant could not be maintained and "literally rotted."

Midway through Missouri's exegesis, it pauses to say that "the vestiges of the violation that federal courts have a mandate to alleviate . . . must not only have been caused by the dual school system in a 'but for' sense, but also have been a part of that dual system." Pet.Brf. at 34. Missouri nowhere explains what it means for a vestige to be "a part of that dual system," and it proffers no citation in support of its enigmatic proposition. Missouri leaves the suspicion, however, that it means to suggest that, having unconstitutionally caused harmful educational and other effects, and (as the district court found in regard to Missouri) having "not taken one affirmative act" to overcome those effects, J.A. at 136, a constitutional violator may avoid any remedial duty by simply waiting until the violations' initial effects are replaced by subsequent ones – as, for example, when segregation-induced white flight leads to financial strangulation that causes school buildings to crumble. If this is, indeed, what Missouri means, its argument runs directly afoul of the Court's holding in *Columbus* that "[e]ach instance of a failure to fulfill th[e] affirmative duty [to eliminate the immediate effects of the violation] continues the violation of the Fourteenth Amendment." *Columbus*, 443 U.S. at 459. *See also United States v. Fordice*, 112 S.Ct. 2727, 2735 (1992) ("If state has not discharged [its] duty, it remains

in violation of the Fourteenth Amendment."). Whether intended or not, that is, each new effect of the wrongdoers' failure to eliminate the vestiges of segregation *is* (in Missouri's words) "a part of th[e] dual system." *Accord Dayton II*, 443 U.S. at 538 ("the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual school system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system"). Missouri, thus, cannot find refuge in the fact that, having established a segregated school system, it then did nothing in the decades after *Brown* to eliminate the effects of its violation and instead allowed those effects to fester, expand, and spread.

4. Scouring the record to find something positive it did to encourage desegregation after 1954, when it explicitly ceded to local school districts the decision whether or not to desegregate, *see supra* at pp. 16-17, Missouri has uncovered only a single instance. Even here, it distorts the record. In its brief, Missouri reports a finding by the district court that the State undertook "substantial" efforts to assist formerly segregated districts. Pet.Brf. at 6 n.6, *citing* J.A. at 29-30. What the district court actually found is *not* that Missouri had been of "substantial" help to school districts, but that it had been of "some" help. *Id.* That help consisted of distributing a total of $85,000 a year in *federal* money among those of its 546 school districts that had been charged with racial discrimination under Title VII, while explicitly eschewing all responsibility for helping schools that were trying to desegregate. *See* testimony of Walker, Tr. at 17663, *cited*, at J.A. at 29-30. Missouri's "substantial efforts to assist formerly

segregated districts" thus turns out to be assistance to districts *defending* against racial discrimination claims, not those trying to eliminate the vestiges of segregation. Tr. at 17825-27. The district court's direct finding on point controls: Missouri has not voluntarily taken "one affirmative act . . . to aid a school district that is involved in a desegregation program." J.A. at 136.

C. The Use of Magnet Schools to Remedy the Segregative Vestiges of the Violation Is Appropriate

Missouri challenges the magnet schools component of the remedy, though that component is not remotely related to either of the questions on which certiorari was granted. Because the courts below carefully "tailored" this aspect of the remedy to cure the " 'condition that offends the Constitution,' " *Milliken II*, 433 U.S. at 282, *quoting Milliken I*, 418 U.S. at 738, its implementation presents no issue deserving of the Court's attention.

Missouri did not appeal the original order requiring preparation of plans for magnet schools, J.A. at 78; it presented expert testimony praising the attractiveness, equitable features, and district-wide nature of KCMSD's magnet plan which the district court thereupon adopted; it failed to present an alternative magnet plan; and it failed to follow through on its alternative proposal to pursue desegregation through mandatory busing. *See supra* at pp. 10-11. The court of appeals affirmed the magnet plan, 855 F.2d at 1304, and this Court denied certiorari, 490 U.S. 1034 (1989). Without explaining why it should be permitted to do so – not having presented the

issue in its certiorari petition – Missouri now proposes to have the Court revisit the issue. Pet.Brf. at 27. The Court should decline the invitation.

As Missouri acknowledges, the district court found that the violation caused "white flight from the KCMSD to suburban districts" and private schools involving "a large number of students." J.A. at 126. As is discussed *supra* pp. 15-16 and n.16, some of this white flight occurred when Missouri literally paid for thousands of white families to leave potentially integrated neighborhoods in the KCMSD, through its agencies' "blatantly" racially-steered relocations of persons displaced by urban renewal and highway construction. The rest of the white flight occurred between 1954 and 1984 when the KCMSD systematically divided its schools into a shrinking number of educationally and physically superior facilities for whites, an expanding number of educationally and physically inferior and overcrowded facilities for blacks, and a small set of "integrated" facilities that in fact were in rapid transition from educationally preferred white schools to educationally disadvantaged black schools. The KCMSD precipitated this racial transition of its schools by inviting white students in integrated facilities to transfer to white schools and by repeatedly detaching white neighborhoods from the attendance zones of integrated schools and reattaching them to those of white schools. Once the district as a *whole* became "integrated," however, whites had nowhere to go, in flight from the inferior schools that they (for the most part accurately) associated with a racially integrated condition, and they then left for the suburbs and private schools. *See* J.A. at 21-28.

Missouri never appealed as erroneous the district court's various findings in this vein, which are summarized *supra* pp.15-20. Notwithstanding that fact, the court of appeals affirmed those findings in the course of considering whether to approve the magnet and capital improvements components of the remedy. 855 F.2d at 1304-05. Now, belatedly, the State mounts two attacks on the findings – (1) that there is a "lack of factual support for the assumption that 'white flight' is a vestige of *de jure* segregation"; and, in any event, (2) that white flight "cannot, as a matter of law, be deemed a vestige of segregation." Pet.Brf. at 38.

Missouri's first, factual, assertion falls afoul of the rule that this Court will not generally revisit the mutually reenforcing findings of two federal courts below (especially when certiorari was neither requested nor granted on the issue). *See, e.g., Goodman v. Lukens Steel, Co.*, 482 U.S. 656, 665 (1987). Even more importantly, Missouri's argument flies in the face of the overwhelming record support for the district court's numerous white flight findings (which the State, of course, cannot avoid by calling them "an assumption"). *See supra*, pp.15-20 (collecting the relevant findings). Plaintiffs put on several expert witnesses and numerous white former citizens of the KCMSD to describe precisely how the defendants' violations relocated or propelled white families out of the districts' schools. *E.g.*, Tr. at 4845-51, 5117-18. The district court cited passages from those same witnesses' testimony in making the findings that Missouri now seeks to challenge. *E.g.*, J.A. at 28, *citing* Tr. at 8715-16, 8721-30, 9228-32, 9235.

Missouri's second, legal, assertion – that white flight cannot as a matter of law be a vestige – has no support in

the case law, and Missouri musters none by way of citation. Why one means of distributing white and black students into separate schools is any more constitutionally privileged than another means – when both are the effect of intentional discrimination, followed by a failure to dismantle the conditions, *e.g.*, inferior schools for blacks, that the discrimination caused – is beyond comprehension. Missouri itself relies heavily on *Green v. County Sch. Bd.*, 391 U.S. 430 (1968), yet *Green* holds that the resistance of whites to attending schools previously identified as "for blacks" and inferior is, *indeed*, a vestige of segregation that the constitutional violator must eliminate to the extent practicable. *Green*, 391 U.S. at 441. *See also Monroe v. Board of Comm'rs*, 391 U.S. 450 (1968). Why the *Green* principle would apply any differently when it is an entire district full of predominantly black schools, rather than individual facilities, that are involved, is, again, beyond comprehension.

Missouri relies, finally, on a set of findings the district court made, early in the proceedings, in dismissing the suburban school districts from any mandatory participation in a school desegregation remedy. *See* Pet.Brf. at 38. The district court's absolution of the suburban school districts of any responsibility for drawing white students out of the KCMSD, however, is in stark contrast to the court's subsequent assignment of that responsibility to Missouri. *See* J.A. at 21, 28, 46, 126. That the district court's remedy focuses (in modest part) on the voluntary attraction of white suburban and private school students back into KCMSD's schools to replace those the violation propelled out of KCMSD's schools is a careful, and entirely unexceptional, application of the established

principle that "the nature of the violation determines the scope of the remedy." *Swann*, 402 U.S. at 16. *See infra* pp. 47-49.

III. THE TWO GOALS OF THE REMEDY – TO DESEGREGATE AND TO ALLEVIATE EDUCATIONAL HARMS – ARE PRECISELY TAILORED TO CURE THE EFFECTS OF THE VIOLATION

Evidently motivated by the weakness of its attacks on the remedy, Missouri ranges yet further beyond the questions presented to attack the violation and effects findings that underpin the remedy. For the reasons set out in the KCMSD's brief at 41, these attacks are not properly before the Court. Nor, for the reasons set out below, are the attacks worthy of the Court's attention. Most particularly, Missouri's attempt to make the remedy appear excessive by downplaying the significance of its violations and their effects is contradicted by extensive findings of the district court and the substantial record below.

As noted, the governing principle in the post-liability stage of a school desegregation case is well settled. The scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S. at 16 (1971). The remedy ordered here scrupulously adheres to this principle because it is carefully tailored to address the dual effects of the State's and the KCMSD's constitutional violations – namely, (1) the concentration of African-American children inside and white children outside the KCMSD's schools and creation of numerous racially isolated schools within KCMSD, and (2) a system-wide reduction in the quality of KCMSD's schools. Each of

these sets of effects accounts, in turn, for one of the remedy's two overarching goals – to desegregate the district's schools and to improve the educational lot of the district's students to the extent necessary and practicable to remedy the violations. Nothing Missouri says detracts from the symmetry between the effects of its violation and the remedial steps ordered below to cure those effects.

1. Missouri opines that all "demographic shifts in population primarily reflect private decision-making," *citing Freeman*, 112 S.Ct at 1148, and argues that "attempts to counteract those shifts" through desegregation remedies are improper. Pet.Brf. at 25. The quotation from *Freeman* on which the state relies, however, is premised upon determinations that the *particular* population shifts at issue there were a "product not of state-action but of private choices." *Freeman*, 112 S.Ct. at 1448. *See also Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 436 (1976).

The facts here are quite different. First, the district court made a comprehensive series of findings, supported by extensive expert, lay, and documentary evidence, that Missouri's and the KCMSD's violations were responsible for demographic shifts. *See supra* pp. 15-20. Second, after hearing weeks of testimony, the district court strongly rejected Missouri's factual contention that neutral demographic changes, rather than state-

sponsored segregation, caused KCMSD's schools to "swell in black enrollment". J.A. at 21.[24]

Third, in *Freeman*, during the seventeen-year period after discrimination had ceased and the remedy had gone into effect, black enrollment increased from 5.6% to 47%, revealing the ongoing effect of neutral forces apart from the violation. *Freeman*, 112 S.Ct. at 1438. Here, by contrast, once the violation ceased and the remedy went into effect, so, too, did the demographic shifts cease. Thus, in the 30 years between *Brown* and the commencement of the remedy, KCMSD's black enrollment increased steadily from 18.9% to 67.7%, whereas in the eleven years since the remedy began, KCMSD's black enrollment has increased *almost not at all*. *See supra* p. 4 and n.8. The only major demographic change since the remedy was imposed, therefore, is that the massive white flight caused by the violations in the 1950s, 1960s, 1970s, and early 1980s (J.A. at 21, 28, Ex.K2) ended with the implementation of the remedy in the late 1980s. *See* Pet.A. at 129 (district court's finding that magnet schools had positive impact upon "residential choices of Kansas Citians"); KCMSD Exs. 2B, 3, 4, 5, 10; Tr. at 36-81 (Jan. 25, 1993)

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[24] The district court found:

> Missouri defended with experts whose opinions declared economics, accessibility to jobs, spacial barriers, personal preference and private discrimination were factors affecting black movement. They all discounted or totally rejected schools and the dual school system as having any effect. To the extent those experts deny the influence of schools in housing patterns, particularly in the context of Missouri's legacy, their opinions are rejected.

J.A. at 21 (record citations omitted).

(magnet schools have reduced racial isolation by attracting into the district's schools hundreds of white children who otherwise would have attended elsewhere).

2. Missouri asserts that the district court "rejected plaintiffs' claims that Missouri had fostered residential segregation." Pet.Brf. at 6. The opposite is more nearly accurate. The district court: repeatedly identified "schools and the dual school system as having an[ ] effect . . . [on] housing patterns"; found "an inextricable connection between schools and housing"; found that Missouri's school segregation violations caused black families to "move [ ] out of districts which did not maintain the state-required schools ... to the KCMSD [which] provided black schools"; and, found that the State's and the KCMSD's violations in the post-*Brown* period caused "a large number of [white] students" to move out of the district. J.A. at 21, 28, 126. Additionally, the district court found: that Missouri had so "encouraged racial discrimination by private individuals in the real estate, banking, and insurance industries" that liability for the resulting school segregation was a "very close question if it hinged solely on [this] encouragement of private discrimination"; that Missouri's encouragement of race discrimination "has and continues to have a significant effect on the dual housing market in the Kansas City area"; and that the State-sponsored dual housing market "caused the public schools to swell in black enrollment" and "still exists to a large degree today". J.A. at 46, 21.

3. Missouri also argues that an aspect of the remedy's desegregation goal, attracting voluntary student enrollment from suburban districts, violates the limitations on interdistrict remedies in *Milliken I*. Pet.Brf. at 28

n.18, 31-32. In fact, the guiding principle of *Milliken I* – that the "scope of the remedy is determined by the nature and extent of the constitutional violation," *Milliken I*, 418 U.S. at 744 – has served as the district court's lodestar in designing the remedy. J.A. at 55 (citing *Milliken I*). Here, as in *Milliken I*, the district court declined to impose a remedy upon autonomous suburban school districts because those districts had themselves not caused any segregation. J.A. at 15. Instead, the remedy has been carried out exclusively by the two proven constitutional wrongdoers, Missouri and the KCMSD, and the remedial acts of those parties have all taken place exclusively within the boundaries of the KCMSD. It is true that, as the Court explicitly permitted in *Hills v. Gautreaux*, 425 U.S. 284, 298 (1976), relying on *Milliken I*, the remedy has some *effects* outside the boundaries of KCMSD. But those effects are entirely on children who voluntarily choose to transfer to the KCMSD. Missouri is simply wrong, therefore, when it says without record citations that the remedy, therefore, requires it to exercise "authority over the local autonomous [suburban] districts." Pet.Brf. at 28 n.18. Rather, precisely as *Milliken* dictates, the nature and scope of the remedy's modest and wholly consensual effects outside the district are precisely commensurate with the nature and scope of the violation and its effects. Having found that violations by Missouri and KCMSD caused whites to flee to the suburbs, J.A. at 126, the district court designed a remedy "aptly tailored to remedy the consequences of the constitutional violation," *Milliken II*, 433 U.S. at 287, by using voluntary transfers to "regain some portion of the white students who fled the

district", 855 F.2d at 1302. Because the desegregative burden falls entirely on the constitutional violators and impinges not a single iota on the autonomy of innocent suburban districts and their students, Missouri's *Milliken I* argument is without merit.

IV. MISSOURI PROVIDES NO BASIS FOR INTERFERING WITH A REMEDIAL PROCESS THAT IS WORKING IN AN APPROPRIATE AND ORDERLY FASHION TOWARDS AN EFFECTIVE AND TIMELY CONCLUSION

Both courts below found that Missouri and KCMSD discriminated against African-American children for the six score years between the Civil War and 1984, and that the violation concentrated African-American children within the KCMSD's systematically under-funded, deteriorated, and educationally inferior schools and depressed the educational attainment of the children in those schools. Both courts below thereafter found that eliminating those segregative and educational-harm vestiges to the extent practicable required educational improvements, magnet schools, capital improvements, and a modest voluntary interdistrict transfer plan. For the first time this school year, the remedy is fully operating. Because initial evaluations have shown that the remedy is working, the district court has directed the parties to begin planning to terminate the remedy. Nothing Missouri says in its brief provides any basis for interfering with this orderly process, or curbing the district court's equitable and remedial discretion, or overturning the district court's and the court of appeals' reenforcing fact findings, or for modifying the Court's long-established

and recently reaffirmed doctrine pursuant to which the lower courts' discretion has been exercised and their fact findings have been made.

CONCLUSION

For the reasons set forth above, the writ of certiorari should be dismissed as improvidently granted or, alternatively, the decisions below should be affirmed.

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Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF OF PETITIONERS

Respondents attempt to portray this case as nothing more than a routine desegregation case involving an unremarkable remedy that has been upheld on the basis of a straightforward application of this Court's desegregation precedents. That portrayal could not be more inaccurate. Instead, there are several distinct elements in this case that cause the holdings below to depart markedly from previous desegregation decisions.

First, there can be no question that, even though this case is and always has been an *intra*district case, the courts below have approved measures that require comparability on an *inter*district, and possibly even *nationwide*, basis [1] in standardized test scores as a condition of discontinuing court supervision. This expansive remedy has been rationalized by the establishment of imprecise twin goals: desegregative attractiveness and suburban comparability. These goals are designed to address conditions that in this case cannot, as a matter of law, be said to be vestiges of *de jure* segregation: "white flight" and system-wide "reduced" achievement.

Second, the educational improvement programs and other aspects of the remedy here are far broader than the "*Milliken II* programs" invoked by respondents and approved for the Detroit school system by this Court in 1977. While the programs ordered in *Milliken* v. *Bradley* were " 'only what is essential' " to provide a remedy to the immediate victims of *de jure* segregation, 433 U.S. 267, 277 (1977) (*"Milliken II"*) (citation omitted), the educational improvement programs now existing in the KCMSD "provide the KCMSD with facilities and opportunities *not available anywhere else in the country*." Pet. App. A-115 (emphasis added). And this lavish approach

[1] The courts below appear to have erected a nation-wide standard for the adequacy of KCMSD student achievement, applying, for example, the criterion that "the District is still at or below national norms at many grade levels." Pet. App. A-131.

was conceived and continued with no real attempt to link its elements to addressing harm suffered by any actual victims of segregation, and without any attention to whether disparities currently exist between the educational opportunities available to black and white schoolchildren.

In response, respondents and the government urge the Court to dismiss the writ as improvidently granted. This is not surprising; respondents cannot defend the excesses of the courts below. Though this Court properly may resolve the issues presented on a narrower basis, the Court may and should resolve the more fundamental issues now. Otherwise, questions concerning the lower courts' flawed remedial goals will resurface as the State pursues unitary status, with the probable effect of further expanding and prolonging the sweeping remedy.

Finally, although respondents attempt to blur the distinction between the violations found on the part of the State and those of the District,[2] the remedy at issue here operates against the *State*, which has not condoned a *de jure* segregated school system since 1954,[3] and which has

[2] For example, the Jenkins respondents assert that "as a consequence of *the defendant's* violations and their financial effects, the KCMSD's schools had 'literally rotted.'" Jenkins Br. 11-12 (quoting J.A. A-219, 237) (emphasis added). The Jenkins respondents apparently intend "the defendant" to refer to the State. But the court found that "the deterioration of the KCMSD facilities is due to deferred maintenance *by the KCMSD*." J.A. A-220 (emphasis added).

[3] The Jenkins respondents emphasize that "[t]he Missouri Constitution continued to require segregated schools until 1976," Jenkins Br. 16, but omit to mention that in *1954* the Missouri Attorney General declared the constitutional provision and related statutes void and unenforceable. J.A. A-19. In a similar distortion, the Jenkins respondents claim that after 1954, the State "never enforced Title VI in schools with respect to race." Jenkins Br. 17 n.18. In 1979, however, the Office of Civil Rights of the United States Department of Health, Education and Welfare certified the KCMSD's compliance with federal school desegregation requirements under the broad discriminatory-effects standard in Title VI of the 1964 Civil Rights Act. Mem. Op. of June 14, 1985, J.A. A-81.

spent some $960 million over the past 10 years to fund the grossly excessive court-ordered remedy. As the district court has recognized, the school districts in Missouri "are more autonomous than those discussed in *Milliken* and numerous other desegregation cases." Order of June 5, 1984, J.A. A-727; see *id.* at A-730-31; State Br. 6. Thus, the KCMSD was actually running the schools and enforcing the constitutionally infirm policies. The court nonetheless found the State liable for failing to act affirmatively to eliminate the dual school system, thus "contribut[ing] to an atmosphere" that tolerated the violations. Order of Sept. 15, 1987, J.A. A-220.

Against this background, the decisions below must be reversed because the funding they order is based on a desegregation remedy that has become unmoored from its only legitimate purpose, to undo the vestiges of *de jure* segregation within the District and thereby ensure equality of opportunity for students of all races. The District suggests that absent a request by the State that this Court declare partial unitary status, the "request that the Court simply 'reverse' the decisions below makes no sense." KCMSD Br. 50. That assertion, like the District's entire argument in part I of its brief, misses the point.

The State does not seek from this Court a declaration of partial unitariness. What the State does argue in seeking reversal of the rulings below is that the lower courts have departed from this Court's desegregation rulings in two related respects. First, courts are constitutionally compelled to scrutinize the challenged conditions and their causes to ensure that "vestiges" have—and continue to have—the requisite "causal link" to the constitutional violation sought to be remedied. *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1448 (1992). That direct relationship is lacking between the intradistrict violation and the court-identified "vestiges" of "white flight" and system-wide "reduced" student achievement. Second, courts must take care to impose remedial measures that are designed to address those specific vestiges. In this case, which is indisputably an *intra*district case, the courts' goals of

desegregative attractiveness and suburban comparability do not meet this test. *Cf. Milliken II*, 433 U.S. 267 (1977). Because the determinations underlying the courts' funding orders are thus inherently flawed, it manifestly "makes sense" that those orders be reversed. Moreover, the remedial orders are grossly overbroad even for the purpose of achieving the impermissible goals adopted by the courts below, and also should be reversed on that ground.

I. THE ORDERS AT ISSUE CANNOT BE EVALUATED FAIRLY WITHOUT A RECOGNITION THAT THE ELEMENTS OF THE REMEDIAL PLAN AT ISSUE IMPERMISSIBLY GO FAR BEYOND THEIR ONLY LEGITIMATE PURPOSE OF ELIMINATING THE VESTIGES OF *DE JURE* SEGREGATION.

Respondents' conclusion that there is no constitutional flaw in the sweeping remedy is merely the tautological result of their basic assumption that the ongoing measures ordered by the courts below are necessary to eliminate the vestiges of *de jure* segregation. But it is this very *assumption* that warrants scrutiny. As the State has shown, the courts below have failed both in interpreting what may properly be considered a "vestige," and in fashioning a remedy appropriately designed to address whatever vestiges may exist. The extraordinary scope and attendant expense of the remedial measures urged by respondents and ordered by the courts below demonstrate the danger of disregarding the bounds of federal judicial authority in a desegregation case.

Respondents and the government insist that consideration of the underlying scope of the remedy is beyond the reach of the questions presented.[4] That insistence is dis-

[4] For the first time in its response, the KCMSD asserts—half-heartedly—that the issues raised in this appeal were never raised below. KCMSD Br. 21. Although claims of waiver must be presented in the brief in opposition or be waived, *City of Canton* v. *Harris*, 489 U.S. 378, 383-84 (1989), the KCMSD did not make a waiver argument in its opposition to the State's petition for a writ

ingenuous, at best. Plainly, the Court legitimately can consider whether the courts below erred in approving funding for ongoing aspects of the desegregation remedy by examining the lawfulness of that remedy. Because the opinions below represented merely incremental budgetary approvals, they do not contain the full rationale behind the decisions. It is therefore completely proper to look beyond the four corners of those decisions and scrutinize the reasoning and determinations that underlie them. Such an inquiry is "essential to analysis" of the decisions below, and presents issues " 'fairly comprised' by the question[s] presented." *Procunier* v. *Navarette*, 434 U.S. 555, 559-60 n.6 (1978) (citation omitted). "Far from being an improper invitation to go outside the question presented, attention to the extraordinary remedy here is the Court's duty." *Missouri* v. *Jenkins*, 495 U.S. 33, 80 (1990) (Kennedy, J., concurring in part and concurring in judgment).[5]

of certiorari. In fact, the State has challenged the scope of the remedy repeatedly, as all parties to this protracted litigation are aware. Thus, the core issue of the appropriateness of the remedial measures is implicated in each and every funding decision, including the funding decisions that underlie the petition.

In addition, respondents and the government repeatedly emphasize that the State did not appeal certain earlier findings or rulings establishing various components of the remedy. *See, e.g.*, KCMSD Br. 6-9, 21; Jenkins Br. 27; U.S. Br. 13. That argument is frivolous; this Court is free to evaluate any preceding aspect of the case, and is not bound by "law of the case." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("[a] petition for writ of certiorari can expose the entire case to review") (citation omitted). *Arizona* v. *California*, 460 U.S. 605, 618 (1983), cited by the District, KCMSD Br. 42, is not to the contrary. In that case, this Court held that it would not reexamine a ruling previously made by the *Court itself*, 460 U.S. at 616-18, because the case concerned rights in real property, *id.* at 620, and "turn[ed] on statutory rather than Court-fashioned equitable criteria." *Id.* at 619.

[5] The State has not, as respondents suggest, argued that the decisions should be reversed because of clearly erroneous factual findings. Though the facts are, of course, crucial to the examination of this unprecedented desegregation remedy, this Court need

A. The Court-Ordered Remedy Exceeds The Scope Of The Constitutional Violation, Which Was Intradistrict In Nature.

1. The district court's implicit conclusion that the KCMSD has not achieved partial unitary status with regard to its "quality education" programs is based on its fundamentally flawed imposition of an unprecedented *inter*district remedy in an *intra*district school desegregation case. That misbegotten remedy, approved by the Eighth Circuit, derogates this Court's mandate that a desegregation remedy must be tailored to fit the constitutional violation. *Milliken II*, 433 U.S. at 280; *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971).

This is an intradistrict case. Appreciating that this remedy can be sustained only on the basis of interdistrict liability, respondents insinuate (but cannot show) that there were findings against the State of an interdistrict violation. To do this, the Jenkins respondents, in particular, distort the record. They assert that the district court found that the State "literally paid for thousands of white families to leave [the KCMSD]," Jenkins Br. 41, and that "neither Missouri nor the KCMSD appealed the findings that they segregated schools and housing in the Kansas City area from 1865 to 1984 and that their violations concentrated black children inside and white children outside the KCMSD." Jenkins Br. 20; see also *id.* at 23; *cf.* KCMSD Br. 43. No such "findings" are cited, and none exists. To the contrary, the district court deter-

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not reverse any findings of fact to reverse the decisions below. What respondents (and the courts below) have characterized as findings of fact either are nonexistent, *see infra* pp. 15-16, or are nothing more than *legal* conclusions that include statements regarding factual issues. See *infra* p. 18; J.A. A-23. "[I]t is important to discriminate between more or less subordinate facts leading to a judgment of their legal significance, and a conclusion—though concurred in by two courts—that may in fact imply a standard of law on which judgment on the case in its entirety is based." *Offutt* v. *United States*, 348 U.S. 11, 15 (1954) (citing cases). The Court obviously is free to review such "conclusions" and to determine whether the claimed factual findings actually exist.

mined "that *none* of the allegedly discriminatory actions committed by the State or federal defendants had caused any significant current interdistrict segregation." *Jenkins* v. *Missouri*, 807 F.2d 637, 662 (8th Cir. 1987) (emphasis added). See generally State Br. 6-7.

The KCMSD goes even further, making the incredible assertion that "the State's claim that the effect of the underlying violation is 'solely intradistrict in scope' is incorrect." KCMSD Br. 43 (quoting State Br. 14). But while the district court's

> order admittedly emphasizes the absence of culpability of the suburban districts . . . . the court explicitly recognized that under *Milliken* "there must be evidence of a constitutional violation in one district that produces a significant segregative effect in another district" . . . . [and] noted that only the schools in one district were affected and that the remedy must be limited to that system.

807 F.2d at 672 (affirming finding of lack of interdistrict liability) (quoting Order of June 5, 1984, J.A. A-810); see also *id.* at 671.

2. To guide federal courts in determining the appropriate extent of their displacement of local control over school districts, this Court has identified six facets of school operations that are reasonably susceptible of objective evaluation. See *Green* v. *County Sch. Bd.*, 391 U.S. 430 (1968). Respondents are incorrect in asserting that the State seeks to transform the "*Green* factors" into a rigid *per se* test. KCMSD Br. 26; Jenkins Br. 31-33; see also U.S. Br. 16-17. To the contrary, the State's fundamental position is that the *Green* factors' measurement of *intra*district remedial authority has been virtually ignored in the lower courts' headlong rush to an interdistrict remedy. Use of the *Green* factors is of central importance in conforming desegregation remedies to the underlying constitutional violation. See *Milliken II*, 433 U.S. at 283. Supplanting these factors with the lower courts' goals of desegregative attractiveness and suburban comparability

signals a perilous deviation from the constitutionally permissible course. See State Br. 29-30.[6]

While courts may certainly take other appropriate factors into consideration in applying their equitable powers, see *Freeman* v. *Pitts*, 112 S. Ct. 1430, 1446 (1992), attempts to produce desegregative attractiveness and suburban comparability through a plethora of State-funded measures range far afield of the analysis of "*Green*-type factors," *id.* at 1454 (Souter, J., concurring), appropriate in an intradistrict case. Contrary to the impression respondents seek to convey, the courts below have not merely appraised a pertinent element in addition to the *Green* factors; rather, they have abandoned wholesale any effort to address the only legally relevant issue: whether racially identifiable schools exist in the KCMSD as a result of pre-1954 *de jure* segregation.

3. Respondents and their *amici*, like the courts below, gauge the "effectiveness" of the vast court-ordered remedial measures by "goals" that are tied—if at all—in solely a rhetorical sense to the State's constitutional violation. These goals—"desegregative attractiveness" and suburban comparability—are far from the "rather precise statement of [the State's] obligations" required of desegregation

[6] The State has not, as the District claims, argued "that the 'well settled approach of *Green* makes no provision for' considering educational harms." KCMSD Br. 26 (quoting State Br. 20); *accord*, U.S. Br. 17. Rather, the State asserted that the proper approach "makes no provision for comparing overall 'student achievement' standards within the KCMSD to some national (or even suburban) standard or to some unstated level of improvement." State Br. 20. *See infra* pp. 18-19. Educational harms that are *caused by the prior dual school* system clearly require correction under *Milliken II*. But because the programs at issue here go far beyond addressing educational harms to victims of constitutional wrongs, they are inherently different from the programs approved in *Milliken II*. Thus, there is simply no basis for the government's declaration that reversing the decisions below "would require this Court to overrule *Milliken II*." U.S. Br. 17. Rather, it is respondents whose position would require that result, as it would render meaningless *Milliken II*'s fundamental requirement that the remedy be tied to the constitutional violation.

decrees. *Board of Educ.* v. *Dowell*, 498 U.S. 237, 246 (1991); see also *Freeman*, 112 S. Ct. at 1444. Instead of providing fair and precise guidance, the courts repeatedly have modified their conclusions regarding the scope of the appropriate remedy,[7] and have adopted a variety of remedial measures without regard for the equitable "balancing [of] individual and collective interests." *Swann*, 402 U.S. at 16. Those measures wrongly curtail the State's traditional decision-making about how to spend limited taxpayers' dollars.[8]

Respondents' approach disregards the appropriate nature and purpose of a desegregation remedy. As this Court made clear in *Dowell* and *Freeman*, such remedies are intended as *temporary* measures to eliminate as much of the effects of earlier *de jure* segregation as practicable.[9]

[7] The goals established by the courts are not only unclear in what they require, but also inconstant. As an example of the "moving target" nature of the courts' analysis, after the State had demonstrated that the schools in the KCMSD provided educational opportunities superior to those afforded by the majority of suburban school districts, *see* J.A. A-452, the court altered its "suburban comparability" goal, instead requiring achievement on standardized tests at the level of *national* norms. Pet. App. A-131.

[8] Respondents seem to believe that the State must forever be required to fund whatever measures respondents and the courts below believe desirable because the State has previously "endorse[d]" and "proposed" a number of the educational improvement programs that were ultimately adopted. Jenkins Br. 8 (citing J.A. A-59, 61); KCMSD Br. 5-6. The State's agreement ten years ago to help fund such programs does not mean either that (1) the State is *now* foreclosed from challenging the unjustified *continuation*, much less the *expansion*, of those programs, or (2) that the State ever agreed that the programs were *constitutionally* required.

[9] Respondents and the government make much of the district court's expressed intent to discontinue the desegregation plan in the next 3 to 10 years. KCMSD Br. 29; Jenkins Br. 49; U.S. Br. 21. What none of them mentions, however, is that the court's "phase-out" plan *requires* permanent funding "at a level commensurate with the current funding or at least at a level where the same quality . . . may be maintained." Pet. App. A-140-41; *see also Jenkins* v. *Missouri*, 23 F.3d 1297, 1301 (8th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3181 (U.S. Aug. 31, 1994) (No. 94-434).

Freeman, 112 S. Ct. at 1445; *Dowell*, 498 U.S. at 247-48. When that has occurred, and the defendant has "demonstrated . . . its good faith commitment to the whole of the court's decree," *Freeman*, 112 S. Ct. at 1446, the federal courts' displacement of local control *must* come to an end. Respondents dispute the State's good faith, apparently relying on the fact that the State repeatedly has opposed the more grandiose elements of the "remedial" plan of the plaintiffs and the District.[10] Respondents cannot seriously contend, however, that the actions of the State in challenging—in a judicial forum—the excesses of this plan demonstrate a lack of good faith of the sort denounced in *Dowell* and *Freeman*.[11]

In fact, as respondents acknowledge, the State participated in good faith in proposing measures to effectuate the court-ordered plan, including "effective schools" programs, a class-size reduction program, a summer program, a "carefully defined and comprehensive" early childhood

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Obviously, this is no "phase-out" at all. Nor is mention made of the District's response to the court's suggestion: "KCMSD understands that the Court has not called for it, in the context of its Financial Plan, to 'plan' at this time for any fundamental alterations to the Court's desegregation remedy over the next ten years . . . ." KCMSD Fin. Plan Filed in Resp. to Apr. 16, 1993, Order, Doc. No. 3516 (Aug. 3, 1993) at 8.

[10] Respondents claim that the magnet schools were not fully operational until sometime in the last three years, Jenkins Br. 36; KCMSD Br. 30, and therefore insufficient time has passed to judge the State's good faith. This is misleading. The magnet schools are only one element of the courts' scheme. The heart of the remedial components, the quality education programs, have been in place since 1985, and have been fully implemented since 1988. Moreover, this accusation ignores the fact that the courts' magnet schools requirements have expanded over time.

[11] The State has *never*, for example, acted to alter boundary lines to evade the desegregation decree or otherwise obstruct the remedial plan. *See North Carolina State Bd. of Educ.* v. *Swann*, 402 U.S. 43, 45 (1971) (rejecting antibusing law as unconstitutional obstruction to court-ordered desegregation); *Wright* v. *Council*, 407 U.S. 451, 465 (1972) (city's attempt to avoid desegregation command by establishment of a separate school system not permissible).

development program, J.A. A-74, full-day kindergarten, and after-school tutoring programs. Jenkins Br. 8-9; see also KCMSD Br. 5-6; Order of Jan. 7, 1988, at 14-15 (district court "acknowledges that progress in achieving a voluntary interdistrict transfer program has been slow, but finds that it is not because of a lack of effort by the State defendants"). Moreover, it cannot be disputed that the State's exemplary 10-year "record of compliance," *Freeman*, 112 S. Ct. at 1446, includes consistent provision of the hundreds of millions of dollars held necessary to fund the "quality education" component of the desegregation remedy alone.

The temporary nature of desegregation remedies derives directly from the value our governmental system places on local control over education. *Id.* at 1445. If local school authorities make different decisions about educational priorities than the federal court would have made, or find their taxpayers unwilling to support programs at the prior, State-funded level,[12] those are not issues with which a federal court has any legitimate concern. Education is not, of itself, a fundamental right. *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450, 458 (1988); *San Antonio Sch. Dist.* v. *Rodriquez*, 411 U.S. 1, 35 (1973); see also J.A. A-482. Because the immense scope of the remedial plan imposed by the lower courts in this case is not constitutionally required,[13] the courts

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[12] The KCMSD's anxiety about "how the voluntary remedy could continue to make progress in desegregating student enrollment if the basic quality of education were plunged back to 1984 levels," KCMSD Br. 20, may be misplaced for an additional reason: respondents' *amicus* The Civic Council, which describes itself as including "several of the KCMSD's major property taxpayers," "strongly supported the tax increase" that was at issue the last time this Court considered this case. Civic Council Br. 4.

[13] For example, the district court rejected the State's proposed $61 million capital improvement plan because it "only estimate[d] the capital improvements necessary to eliminate health and safety hazards and to provide a good learning environment." J.A. A-220-21. Instead, the capital improvements plan was budgeted in 1988 for $265 million, *id.* at A-218, an amount deemed necessary not only to correct health and safety problems, but also to ensure that there

below lack authority to impose it, or to require the State to pay for it. *Cf. Missouri* v. *Jenkins*, 495 U.S. at 76 ("[i]t cannot be contended that interdistrict comparability . . . is itself a constitutional command") (Kennedy, J., concurring in part and concurring in judgment).

B. The Remedy Is Fundamentally Flawed Because It Is Designed To Cure Conditions That Are Not, As A Matter Of Law, "Vestiges" Of *De Jure* Segregation.

1. By seeking to shift the focus onto the question of whether the State had proved "that the vestiges of segregation in the District . . . had been remedied to the extent practicable," KCMSD Br. 20, respondents put the cart before the horse. This approach bypasses the fundamental legal question of what the vestiges of *de jure* segregation in Kansas City are, and similarly skirts the question whether existing remedial measures are adequately tailored to cure those vestiges. The Court must first determine whether the asserted "vestiges" are truly direct remnants of the State's unconstitutional actions in mandating a dual school system before 1954; if not, there plainly can be no constitutional obligation to remedy them.

The Constitution does not permit a court's approach to defining what is a "vestige" of *de jure* segregation to become—as it has here—a freewheeling identification of those elements of the school system or community that the court wishes to improve. See *Milliken II*, 433 U.S. at 280-82. And it is well established that federal court decrees are unnecessary "if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation." *Id.* at 282 (citation omitted).

2. This Court has made plain that the vestiges to be cured by a desegregation remedy must be proximately

would be no "floor coverings with unsightly sections of mismatched carpeting and tile, and individual walls possessing different shades of paint." *Id.* at A-221. Such lavish attention to detail is hardly constitutionally required.

linked to *de jure* segregation. *E.g.*, *Freeman*, 112 S. Ct. at 1448. Superficially, respondents agree with this well settled proposition. See Jenkins Br. 34; KCMSD Br. 35. Their approach, however, like that of the courts below, expands the concept of proximate causation to untenable proportions.[14]

Respondents seek comfort in *Milliken II*, in which this Court recognized that where children have been "educationally and culturally set apart from the larger community," they may "acquire habits of speech, conduct and attitudes reflecting" that isolation, at which education programs properly may be directed. 433 U.S. at 287 (quoted in Jenkins Br. 34). But as the very language quoted by respondents demonstrates, the vestiges of *de jure* segregation that are to be cured by federal court intervention are those disparities that are directly connected to the incidence of *de jure* segregation itself, and that have demonstrated effects on *minority* students.[15]

[14] In another of their pervasive attempts to mischaracterize the State's argument, the Jenkins respondents claim that the State has argued, citing *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406 (1977) ("*Dayton I*"), "that plaintiffs have the burden of demonstrating the causal link between existing conditions and past *de jure* segregation." Jenkins Br. 36-37 (citing State Br. 34 & n.22). It may be that the time has come to consider such burden-shifting. *See Freeman*, 112 S. Ct. at 1453 ("At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools") (Scalia, J., concurring). Nevertheless, that was not the State's argument. The page in the State's brief that the Jenkins respondents cite does not even mention *Dayton I*, and the discussion contained in that section concerns the importance of proximate causation in this context.

[15] The government contends that "petitioners were required to show initially, not only that the *Milliken II* programs had been fully implemented, but also that the systemwide reduction in student achievement attributable to prior segregation had, as a result, been eliminated to the extent practicable." U.S. Br. 15-16. This approach contrasts dramatically with the position the government advocated the last time it addressed that question before this

It is far from surprising that in 1977, when this Court heard *Milliken II*, there were still some children in the Detroit school system exhibiting the sorts of "[r]eading and speech deficiencies," *id.* at 290, that result from an inferior, segregated education. This case, by contrast, arises 18 years after *Milliken II*, and 30 years after Missouri ceased requiring racially separate schools.[16] Plainly, "[a]s the *de jure* violation becomes more remote in time and . . . demographic changes intervene, it becomes less likely that a current [condition] in a school district is a vestige of the prior *de jure* system," *Freeman*, 112 S. Ct. at 1448, a proposition with which the government agrees. See U.S. Br. 19.[17] The Jenkins respondents oppose this common-sense notion, arguing that the passage of time is relevant *solely* to the defendant's good faith. Jenkins Br. 35. This is simply wrong.

3. Respondents argue that the district court made a "factual finding" that "white flight" was a vestige of segregation, and that this finding was "never appealed as erroneous." Jenkins Br. 42; see also KCMSD Br. 43. But the district court's statement that it previously "found that segregated schools . . . [have] led to white flight from

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Court: "Although it certainly may be permissible to institute" *Milliken II* programs to deal with education deficits traceable to the *de jure* system "in the first instance, . . . to maintain jurisdiction until such amorphous effects are eliminated is to guarantee that federal court supervision will operate virtually in perpetuity." Brief for the United States as *Amicus Curiae* Supporting Petitioners at 16 n.9, *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992) ("U.S. *Freeman* Br.") (citations omitted).

[16] "Missouri's violation in this case" was *not* "in full swing in 1984," as the Jenkins respondents assert. Jenkins Br. 36. The district court found that in 1984, the *KCMSD* had "not entirely dismantled the dual school system." J.A. A-25. And the court rejected the bulk of plaintiffs' arguments that the State's conduct since 1954 had affected housing patterns or otherwise limited desegregation. *See* J.A. A-43-44.

[17] The government mischaracterizes the State's argument as urging a "conclusive presumption" that all causal links are broken by the passage of time. U.S. Br. 19. The State counsels no such conclusive presumption.

the KCMSD," J.A. A-126, is not itself a finding of fact.[18] Nor was there *ever* any such finding. To the contrary, the district court recognized that "white flight" is more accurately termed a "vestige" of desegregation.[19] See, *e.g.*, J.A. A-239 (citing "an abundance of evidence that many residents of the KCMSD left the district and moved to the suburbs because of the district's efforts to *integrate* its schools") (emphasis added).[19]

The Jenkins respondents now attempt to "prove" through flagrant misrepresentation of the record that "white flight" resulted from segregation. In doing so, they offer theories and factual allegations that the district court has long since rejected, and never relied upon.[20] The simple fact is—regardless of what belief the district court and court of appeals may now embrace—no factual

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[18] *See supra* note 5; State Br. 37 n.25. Contrary to the Jenkins respondents' baseless claim, *see* Jenkins Br. 41, the State certainly has never "acknowledge[d]" that any such factual finding exists.

[19] Similarly, the district court never found, as respondents claim, that "defendants' violation . . . concentrated black children inside and white children outside the KCMSD." Jenkins Br. 3; *cf.* KCMSD Br. 43. Rather, the district court found that under the pre-1954 dual school system, the movement of "some blacks . . . to districts, including the KCMSD, that provided black schools . . . was insignificant when compared to the total black enrollment in the KCMSD." J.A. A-19; *see also id.* at A-20 (black migration product of "a host of factors").

[20] *Compare, e.g.*, Jenkins Br. 41-42 (claiming the district court found the KCMSD's liberal transfer policy to be segregative) *with* J.A. A-25 (district court finding that "the liberal transfer policy was not adopted or maintained to foster segregation"); Jenkins Br. 41-42 (citing as a court finding that white flight occurred in part because of state "agencies' 'blatantly' racially-steered relocations of persons displaced by urban renewal and highway construction") *and id.* at 15 (referring to "numerous" "actions by state officials that continued into the 1970s and were 'intended to cause housing segregation'") (purporting, apparently, to quote court finding not evident at or near J.A. cite provided) *with* J.A. A-45 (district court finds no "evidence whatsoever that the state agencies exercised coercive power or significantly encouraged [private discrimination]" in the areas of real estate, financing, insurance, and public accommodations).

finding has ever been made in support of the courts' current styling of "white flight" as a vestige of *de jure* segregation. And for the reasons stated in the State's opening brief, such a characterization profoundly distorts the concept of proximate causation. See State Br. 37-39.

4. Nor have respondents demonstrated how "reduced" achievement of black *and* white students system-wide could be a vestige of segregation. The Jenkins respondents emphasize the district court's conclusion that "[o]verall, the violation and its financial effects on the KCMSD produced a 'system-wide reduction in student achievement.'" Jenkins Br. 21 (quoting J.A. A-58). But, like the courts below, they nowhere explain how such a "system-wide" effect can be a vestige of segregation.

The KCMSD thoroughly mischaracterizes the State's argument by claiming the State contends "that educational harms *as a matter of law* cannot be a vestige of segregation." KCMSD Br. 45. The State has made no such claim, nor has it ever questioned that "[w]here the remedy is properly tailored to the constitutional violation, courts may . . . require special remedial programs for the students directly harmed by racial segregation." State Br. 41 (citing *Milliken II*). But that responsibility does *not* give federal courts license to erect expensive long-term programs to counteract perceived "reduced" scholastic achievement for *all* students in the District—including those who could not even remotely have been injured by earlier *de jure* segregation. Neither respondents nor any of their *amici* have come close to explaining in what way measurement of *system-wide* achievement—which lacks any scrutiny of the educational opportunities provided for *black* students as compared to *white* students within the school district—is related to any inferior educational opportunities offered to black schoolchildren under the dual school system that existed decades ago. See State Br. 41 n.27.[21]

[21] The government's position parallels strikingly that of respondents when it argues that "a reduction in student achievement" should be held to "flow from [the constitutional] violation," U.S. Br. 16-17 (internal quotations omitted), but makes *no* mention of how "reduced" achievement system-wide possibly relates to acts that "had caused *minority school children* to suffer significant deficiencies in basic educational skills." *Id.* at 17 (emphasis added). Also like respondents, the government relies on the district court's unsupported statement that "white flight" was a vestige of segregation (rather than of desegregation). *Id.* at 19 n.2. This relaxed approach to the proper identification of a vestige contrasts sharply with the government's position before this Court in *Freeman* v. *Pitts* four years ago: "'[v]estiges' . . . are best understood as 'remnants': they must not only have been caused by the dual school system, but themselves have been a part of the dual school system . . . . [D]esegregation decrees are not properly designed to alter features not inherent in the school system, such as uneven residential distribution or disparities in income." U.S. *Freeman* Br. 13-14.

5. Respondents can point to no factual basis in the record to link existing salary levels in the KCMSD to an earlier constitutional violation by the State. Respondents make a hopelessly attenuated argument that because of "white flight," the tax base in the KCMSD was diminished, and salaries therefore suffered. Jenkins Br. 29; KCMSD Br. 49. This stretch of imagination is unavailing. As shown above and in the State's opening brief, there is simply no basis for concluding here that "white flight" is a consequence of *de jure* segregation. See *supra* pp. 14-16; State Br. 37-40. Moreover, there is no evidence of any direct link between the State's actions before 1954 and the salaries the KCMSD has negotiated with the teachers' unions. The across-the-board salary increases ordered by the courts below therefore are not a proper exercise of the courts' authority to eliminate "vestiges" of segregation to the extent practicable.

II. THE COURTS BELOW REQUIRED IMPERMISSIBLE MEANS FOR ACHIEVING THE STATED GOALS, EVEN MEASURED AGAINST THOSE GOALS ON THEIR OWN TERMS.

The funding ordered in the decisions below is earmarked for educational programs designed to raise scores on standardized tests system-wide and for across-the-board

salary increases in the KCMSD. Even if the "goals" of this remedial plan were constitutionally authorized—which they are not—these funding orders are unlawful because the measures they enable are not sufficiently related even to those flawed goals.

Respondents now claim that "improved test scores, as measured by national averages," are not required by the remedy as currently interpreted and imposed, although the District has an "internal goal" of standardized test scores at or above the national norm.[22] KCMSD Br. 34-35 (citations & internal quotations omitted); see also Jenkins Br. 25-26. To support this, the District provides a selection of inquiries it says may shed light on whether "educational vestiges have been eliminated." KCMSD Br. 37-38. The District's list includes comparisons between white and black schoolchildren with respect to: suspension rates, placement in remedial or honors classes, teacher attitudes and practices, attendance, grades, drop-out rates, post-secondary enrollment, and test scores. *Id.* But these criteria—with the sole exception of test scores—*do not appear in the district court's (or court of appeals') decisions.*[23]

The court of appeals when challenged may have denied that standardized test scores were the only relevant consideration in the district court's decision, but as the judges

[22] Below, by contrast, respondents argued vigorously that "[f]or the State to receive a declaration of partial unitary status on the educational components . . . it must show that achievement overall has increased." Appellees' Resp. to Pet'n for Reh'g at 6; *see also* J.A. A-436-38; KCMSD App. Br. 2, 5, 6, 23-26. Respondents relied *exclusively* on test scores in making their point about "achievement."

[23] This case does not present the question whether such inquiries are appropriate because *they were never made.* And ironically, the inventory of school operations the District provides consists exclusively of matters that the *District* controls in its sole discretion. Therefore, an outcome-based standard cannot be used fairly to continue to hold the *State* responsible for providing massive funds to the District based upon a "failure" to produce "results" over which the *District* has exclusive control.

dissenting from that court's denial of rehearing *en banc* made plain, "[t]he only factor the district court saw standing in the way of unitary status for the educational programs was continued below average academic performance. Indeed, no other evidence in the record supports a conclusion that the education enhancement . . . program of the KCMSD is wanting." Pet. App. A-60-63 (discussing evidence).[24] Moreover, when the lower courts used the only criterion applied—test scores—they did not compare the achievement between white and black schoolchildren (as respondents now assert is appropriate); instead, they measured achievement of *all* students against unspecified national standards.

Respondents make no real attempt to defend the courts' approval of salary increases for *all* employees of the KCMSD. They simply repeat the conclusory determinations of the courts below "that salary relief was 'a necessary component of the desegregation program.' "[25] Jenkins Br. 28 (citation omitted); see also KCMSD Br. 6. Salary increases were originally ordered "to fund *teacher* salary increases," J.A. A-234-35 (emphasis added), and the decisions below are devoid of any explanation of why main-

[24] The District and the government claim that the State has the burden of showing that factors other than past *de jure* segregation "account for continuing deficiencies" in the KCMSD. U.S. Br. 13; KCMSD Br. 23. But this would be true only if the plaintiffs had shown "continuing deficiencies" that were truly vestiges of the State's former dual school system in the first place. But—despite the appellate court's and respondents' protests to the contrary—the *only* "continuing deficiency" identified by the court and relied upon by the plaintiffs was the failure of some students, both black and white, in the KCMSD to achieve standardized test scores at the national average. Because that shortcoming is improper as a measure of the effects of quality education on minority students (the only KCMSD students who might be said to be victims of prior segregation), it does not relate to a true vestige of segregation. Thus, the State does not bear the burden of countering it.

[25] This is not a factual finding at all, *cf.* Jenkins Br. 28; KCMSD Br. 41, but rather, a legal conclusion that "involve[s] the very basis on which judgment . . . is to be made." *Baumgartner* v. *United States*, 322 U.S. 665, 671 (1944). *See supra* note 5.

taining salaries at increased levels for employees who are *not* teachers should be in any way "necessary" to satisfy even the questionable goals set by the lower courts.[26]

CONCLUSION

For the foregoing reasons, together with the reasons set forth in the State's opening brief, the judgments below should be reversed.

Respectfully submitted,

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[26] The KCMSD denies the importance of the court's desegregative attractiveness rationale to the orders raising salaries for non-instructional employees. KCMSD Br. 48 (quoting State Br. 43). This is incorrect: "[T]he basis for this Court's ruling is grounded in remedying the vestiges of segregation by improving the desegregative attractiveness of the KCMSD. In order to improve the desegregative attractiveness of the KCMSD, the District must hire and retain high quality teachers, administrators *and staff*." Pet. App. A-90 (emphasis added).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MISSOURI, ET AL., PETITIONERS

v.

KALIMA JENKINS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

The United States will address the question whether the court of appeals applied the proper legal standards in deciding that court-ordered remedial education programs should not be terminated. We leave to the parties the more narrow, fact-bound question whether the district court abused its discretion in ordering salary increases for non-instructional personnel.

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INTEREST OF THE UNITED STATES

This case concerns the proper legal standards for deciding when court-ordered remedial education programs should be terminated. The United States has a direct interest in the proper resolution of that question. The United States has responsibility for enforcing school desegregation under Titles IV, VI, and IX of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6, 2000d, and 2000h-2, and the Equal Educational Opportunities Act of 1974, 20 U.S.C. 1701 *et seq.*, and is a party in several hundred desegregation cases. Consistent with that responsibility, the United States has participated in most of this Court's school desegregation cases, including the

recent cases of *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992), and *Board of Educ.* v. *Dowell*, 498 U.S. 237 (1991).

STATEMENT

1. a. In 1977, the Kansas City, Missouri, School District (KCMSD) and KCMSD students filed suit against the State of Missouri and various state officials (petitioners), several suburban school districts, and several federal agencies. After the district court realigned the KCMSD as a defendant, an amended complaint was filed alleging that the State, the suburban districts, and the federal agencies had caused interdistrict segregation among the school districts in the Kansas City metropolitan area. The amended complaint also alleged that the State and the KCMSD had caused segregation within the KCMSD schools.

In 1984, the district court issued two opinions on liability. In the first opinion, the court found that there was no interdistrict violation committed by the suburban defendants warranting interdistrict relief. J.A. A721-A820. In the second opinion, however, the court found that the State and the KCMSD had caused and had legal responsibility for racial segregation within the KCMSD. *Jenkins* v. *Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984).

The court found that Missouri law required the KCMSD to segregate students on the basis of race before 1954. 593 F. Supp. at 1490. In 1954, the State Attorney General issued an opinion declaring the state statutes requiring segregation unenforceable. However, the State did not repeal its constitutional provision mandating racially segregated schools until 1976. *Ibid.*

The court found that, after 1954, the KCMSD "chose to operate some completely segregated schools and some integrated ones." *Jenkins*, 593 F. Supp. at 1492. At the time of the district court's 1984 decision, 24 schools

remained more than 90% black. *Id.* at 1493. The court found that these overwhelmingly black schools were vestiges of the dual system. *Ibid.*

The court also found that "inferior education indigenous [to] the state-compelled dual school system has lingering effects in the [KCMSD]." *Jenkins*, 593 F. Supp. at 1492. The court noted that "[s]everal witnesses confirmed * * * that forced segregation ruins attitudes" and that "[t]he general attitude of inferiority among blacks produces low achievement." *Ibid.* (citation omitted).

The court rejected the State's argument that it should not be held liable for the segregation in the KCMSD because state law precluded it from requiring the KCMSD to desegregate in the post-1954 period. *Jenkins*, 593 F. Supp. at 1504-1505. The court explained that "[t]he state executive and its agencies as well as the State's General Assembly had and continue to have the constitutional obligation to affirmatively dismantle any system of de jure segregation, root and branch. * * * This case is before this Court simply because the KCMSD and the State have defaulted in their obligation to uphold the Constitution." *Id.* at 1505.

b. The court issued its first remedial order in 1985. 639 F. Supp. 19. In its opinion, the court elaborated on the harm to educational achievement caused by the State's and the KCMSD's failure to eliminate the dual system. The court found that "[s]egregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD." *Id.* at 24. The court cited test results showing that only a few elementary schools in the KCMSD were performing at or above national norms in math and reading. *Ibid.* The court also found that the "education process has been * * * 'bogged down' in the KCMSD by a history of segregated education," and that

"[t]oo often, as a result, a higher percentage of black students are among the lower achievers." *Id.* at 28. The court concluded that its remedy should include educational programs designed to "remedy the ill effects of the unconstitutional segregation and to attract and maintain non-minority enrollment." *Id.* at 24.

Both the State and the KCMSD agreed that the court should order into effect programs "designed to increase student achievement at the elementary and secondary levels." 639 F. Supp. at 25. They also agreed that such programs should include "achieving AAA status,[1] reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs." *Id.* at 26. The court adopted those suggestions and several others. *Id.* at 26-32. These student achievement programs are referred to by the parties as *Milliken II* programs because they are the kinds of programs this Court approved in *Milliken* v. *Bradley*, 433 U.S. 267 (1977) (*Milliken II*), to overcome the educational deficiencies caused by racial segregation. In addition to ordering the *Milliken II* programs into effect, the district court also ordered the development of a magnet school program, a program for voluntary interdistrict transfers, and a capital improvements program. 639 F. Supp. at 34-35, 38-41.

c. In 1986, the court of appeals issued a single opinion on liability and remedy. 807 F.2d 657 (en banc). The court upheld the district court's rejection of a mandatory

[1] The Missouri State Department of Elementary and Secondary Education classifies school districts according to the quality of their programs. The highest classification is AAA, which means that the school system "has the resources necessary to provide minimum basic education to its students." 639 F. Supp. at 26.

interdistrict remedy and affirmed the remedies ordered by the district court with several modifications.

The State did not appeal the finding of liability or the remedial imposition of most of the *Milliken II* programs. 807 F.2d at 662, 682-683. The State challenged only the requirements that it pay for the increase in the number of teachers beyond that necessary to achieve AAA status, that it pay for an "effective schools program," that it establish a program for voluntary interdistrict transfers, and that it pay for capital improvements. *Id.* at 683-686. The court of appeals held that the costs for increasing the number of teachers and for the effective schools program should be divided equally between the State and the KCMSD. *Id.* at 684-685. It held that a program of voluntary interdistrict transfers was a valid remedy for the State's violation. *Id.* at 683-684. And it held that capital improvements were necessary for successful desegregation. *Id.* at 685. This Court denied certiorari. 484 U.S. 816 (1987).

2. Between 1986 and 1988, the district court issued a series of additional remedial orders relating to magnet schools, *Milliken II* programs, and capital improvements. The district court also issued an order raising property taxes to assist the KCMSD in funding its share of the remedy. The State appealed from a number of those orders. In 1988, the court of appeals resolved those appeals in a single opinion. 855 F.2d 1295 (1988).

The district court had ordered magnet programs into effect, in part, in an attempt to attract white students from private schools and the suburbs into the KCMSD schools and to retain those white students who were still in the system. The State argued that this goal was unrelated to the violation. The court of appeals rejected that argument, noting that the district court had found that "the existence of segregated schools led to white

flight from the KCMSD to suburban districts and to private schools." 855 F.2d at 1302.

The court also rejected the State's argument that the district court had erred in establishing a goal of improving the education for all students in the KCMSD system. The court held that the district court "did not view improving education for all KCMSD students as an end in itself, but as a means to serve the goals of restoring to the victims the education they have been denied and of attracting and maintaining whites in the KCMSD." 855 F.2d at 1303. The court therefore concluded that the district court did not "abus[e] its discretion in using system-wide educational enhancements to accomplish its legitimate desegregative objectives." *Ibid.*

The court also rejected the State's argument that the capital improvement program exceeded the scope of the State's violation. The court found ample support for the district court's finding that "the State by its constitutional violations and failure to remove the vestiges of the dual school system 'contributed to, if not precipitated, an atmosphere which prevented the KCMSD from raising the necessary funds to maintain its schools.'" 855 F.2d at 1305. The court concluded that the findings "demonstrate a spiraling effect of white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." *Ibid.* The court added that "[e]ven absent the findings that the State contributed to causing the decay, the capital improvements would still be required both to improve the education available to the victims of segregation as well as to attract whites to the schools." *Ibid.*

Finally, the court of appeals affirmed the order requiring an increase in property taxes. The court held, however, that any future orders affecting taxes should permit the KCMSD to impose the tax, with the court's role limited to enjoining any state law that would prevent the tax from taking effect. 855 F.2d at 1308-1315.

This Court granted certiorari on the property tax issue, but denied certiorari on the scope of the remedy. See 490 U.S. 1034 (1989). On the merits of the property tax issue, this Court held that the district court lacked authority to order property tax increases itself. The Court agreed with the court of appeals, however, that the district court could order the KCMSD to set a tax levy and enjoin any state laws that would prevent the tax from taking effect. 495 U.S. 333 (1990).

3. The issues before this Court now arise from two orders issued by the district court in June, 1992. One required funding of the *Milliken II* programs for the 1992-1993 school year. Pet. App. A69-A75. The other approved the KCMSD's proposed schedule for salary increases for the 1992-1993 year. *Id.* at A76-A93. The court of appeals affirmed those orders in November, 1993. *Id.* at A1-A42.

a. Relying on *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992), the State argued in the district court that the *Milliken II* programs had been fully implemented and that this aspect of the KCMSD's operations should therefore be declared unitary. The district court required the funding of those programs, without expressly addressing the State's unitariness argument. Pet. App. A9-A10.

On appeal, the State argued that the district court had erred in failing to address the unitariness issue. The court of appeals held that the district court's approval of the continuation of the programs constituted a rejection of the State's argument and was necessarily based on a

finding that "the goals of the desegregation programs, the elimination of the vestiges of past discrimination to the extent practicable, had not yet been achieved." Pet. App. A10-A11.

The court of appeals then held that the district court did not err in refusing to grant the State's request for a declaration of partial unitariness. The court characterized the State as arguing that because the *Milliken II* programs had been fully implemented, the State was entitled to a declaration of partial unitariness. Pet. App. A14. The court of appeals rejected that argument on the ground that *Freeman* required the State to show that the "vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent practicable." *Id.* at A20-A21. The court concluded that the "only evidence before the district court with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made." *Id.* at A19. The court explained that while the State's Assistant Commissioner of Education described how the *Milliken II* programs had been established, he did not indicate whether they had succeeded in improving student achievement. Pet. App. A18. The court also observed that KCMSD's witnesses stated that while the *Milliken II* programs were making progress, more could be achieved. *Ibid.* A18.

The court then provided additional guidance to assist the district court in further proceedings on unitariness. The court stated that "careful factfinding and detailed articulation of findings will be required," that "[t]he success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation," and that "[i]t will take time to remedy the system-wide

reduction in student achievement in the KCMSD schools." Pet. App. A20-A21. The court also noted with approval that the district court had ordered the KCMSD to prepare plans based on the assumption that court-ordered funding would be withdrawn in three to ten years. *Id.* at A13.

b. The court of appeals also affirmed the salary increase order. The court relied upon the district court's finding that such salary increases were necessary to retain the personnel necessary to implement the required quality educational programs and the magnet schools. Pet. App. A23-A24.

4. The Eighth Circuit denied rehearing en banc. Pet. App. A43-A68. Three of the six judges who voted to deny rehearing en banc, including two of the judges from the original panel, explained their reasoning. They stated that the State had misread the panel opinion as holding that student achievement is the sole basis for determining whether the effects of past discrimination have been remedied. The three judges explained that while "test results must be considered," they "must be only one factor in the equation." *Id.* at A48. (Gibson, J., joined by McMillian, J., and Magill, J.).

Five judges dissented from the denial of rehearing en banc. They concluded that "[t]he district court has, with the approbation of the panel, imbedded a student achievement goal measured by annual standardized tests into its test of whether the KCMSD has built a high-quality educational system sufficient to remedy past discrimination" and "[t]he Constitution requires no such standard." Pet. App. A58. The dissenting judges added that while there was "no question that the reduced educational attainment discerned by the district court in 1984 resulted from acts of racial discrimination and represented 'vestiges' of past unlawful segregation,

* * * [t]o require achievement test scores at or above the national norm is to require the school system to be responsible for circumstances beyond its control." *Id.* at A63-A64. The dissenting judges also concluded that the district court's salary order was not tailored to the violation insofar as it required salary increases for non-instructional personnel. *Id.* at A57.

SUMMARY OF ARGUMENT

A. Petitioners sought certiorari on two questions: whether the court of appeals erred in considering test scores in deciding that the *Milliken II* programs should not be terminated, and whether the court of appeals erred in approving salary increases for non-instructional personnel. Most of petitioners' brief, however, is devoted to the very different question of whether the original remedial plan exceeded the scope of the violation. That issue was finally resolved years ago, petitioners did not seek to reopen it below, and it is not fairly included within either of the questions presented. Petitioners' challenge to the original remedy is therefore not properly before this Court.

Petitioners' assertion that their challenge to the remedy should be considered because the orders under review are inextricable products of that remedy is unpersuasive. Petitioners argued in the district court, in the court of appeals, and at the petition stage that the original remedy did not justify either of the orders under review. If petitioners now believe that the only way to attack the orders under review is to attack the original remedy, we suggest that the proper response is not for the Court to review a question on which it did not grant certiorari and which was not raised below. Instead, the Court may wish to consider dismissing the writ of certiorari.

B. The court of appeals properly rejected petitioners' request to terminate their obligation to fund the *Milliken II* programs. This Court's decisions in *Board of Educ.* v. *Dowell*, 498 U.S. 237 (1991), and *Freeman* v. *Pitts*, 112 S. Ct. 1430 (1992), establish the framework for resolving that issue. Under *Dowell* and *Freeman*, a party seeking partial termination of a decree must show both that it has complied with the part of the decree it seeks to terminate *and* that the effects of the violation sought to be remedied by that part of the decree have been eliminated to the extent practical. Petitioners made only the first showing. They made no effort to show that the deficiencies in basic educational skills that the *Milliken II* programs were designed to remedy had been eliminated to the extent practical.

Petitioners seek to escape the consequences of their failure by arguing that educational deficiencies can never be viewed as a vestige of a racially segregated school system. That argument is foreclosed by this Court's decision in *Milliken* v. *Bradley*, 433 U.S. 267 (1977). In that case, the Court held that where racial segregation has depressed educational achievement, federal courts may require state and local school officials to implement programs designed to raise the level of student achievement. The district court in this case found that racial segregation had caused just such educational deficiencies and it properly ordered remedial programs designed to correct those deficiencies.

Nor does the passage of time since the *Milliken II* programs were fully implemented establish that there is no link between past segregation and current educational deficiencies. At the time of the district court's decision, the *Milliken II* programs had been fully implemented for three years. In *Milliken II*, the Court noted that curing educational deficiencies caused by

segregation would necessarily take time. It would be inappropriate to presume, without any further factual support, that the educational deficiencies caused by petitioners' lengthy constitutional violation have been fully remedied in three years. In *Dowell* and *Freeman*, where the remedies had been implemented for a much longer period of time, the Court rejected the view that the passage of time alone conclusively established that current conditions were not traceable to prior segregation. Instead, the Court insisted upon a fact-intensive inquiry into that issue.

School desegregation remedies are intended to be temporary and the courts below are aware of that. They have consequently asked the parties to prepare for the elimination of court-ordered funding in three to ten years. This Court should not intervene in that process.

C. The court of appeals did not impose a requirement that student test scores reach a certain level before the *Milliken II* programs could be terminated. Instead, it held that test scores were one relevant factor bearing on that issue. That holding is correct. Since the relevant inquiry is whether a systemwide reduction in achievement attributable to segregation has been remedied to the extent practicable, it would be improper to ignore test scores altogether. The court considered test scores when it found that racial segregation had depressed educational achievement. It is logical that test scores should also be considered in deciding whether that violation has been remedied. Proof that test scores remain substantially behind levels achieved by students who have not been subjected to segregation could be a sign that the deficiencies caused by prior segregation have not, in fact, been remedied to the extent practicable.

Of course, there could be a variety of other explanations for continuing deficiencies in performance by

students who have been subjected to segregation. These include poverty, crime, and lack of parental involvement. Under *Dowell* and *Freeman*, however, petitioners have the burden to show that such factors, rather than segregation, account for continuing deficiencies. Petitioners have not attempted to make such a showing. The mere assertion that factors besides segregation are entirely responsible for current deficiencies is no substitute for proof.

ARGUMENT

THE COURT OF APPEALS CORRECTLY APPROVED THE CONTINUATION OF THE *MILLIKEN II* PROGRAMS

A. The Court Should Not Consider Petitioners' Challenge To The Propriety Of The Original Remedy

In their petition for certiorari, petitioners raised two issues: (1) whether the court of appeals erred in considering test scores in determining that remedial educational programs should not be terminated; and (2) whether the court of appeals erred in approving salary increases for school district employees. Most of petitioners' brief on the merits, however, is directed to a much different question: Whether the original remedial plan imposed by the district court in 1985 exceeded the scope of the constitutional violation. That issue was finally resolved years ago, and this Court has denied certiorari on it two times. Petitioners did not attempt to reopen that issue in either the district court or the court of appeals. Nor is that issue fairly included within either of the questions presented in the certiorari petition.

Except in unusual circumstances, this Court will "not consider questions outside those presented in the

petition for certiorari." *Yee* v. *City of Escondido*, 112 S. Ct. 1522, 1532-1533 (1992); *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992); see also Sup. Ct. R. 14.1(a). Because there are no such unusual circumstances here, the Court should not consider petitioners' challenge to the original remedy.

Petitioners candidly admit that they seek to reopen the question of the propriety of the original remedy. Br. 18-19. To justify that request, petitioners contend that the orders at issue here are "inseparable products" of the lower courts' remedy. Br. 27 n.17. As petitioners elsewhere acknowledge, however, "each question can be dealt with on its own terms." Br. 18. And until now, petitioners have done exactly that. In the district court, in the court of appeals, and at the petition stage, petitioners argued that the court's original remedy provided no justification for the orders under review. If petitioners have now come to the conclusion that the only way to attack the current orders is to attack the original remedy, the proper response is not for this Court to review a question that has already been settled, that was not raised below, and on which it did not grant certiorari. Instead, the Court may wish to dismiss the writ of certiorari.

B. The Court Of Appeals Correctly Held That The *Milliken II* Programs Should Not Be Terminated Until Petitioners Show That The Educational Deficiencies Caused By Prior Racial Segregation Have Been Eliminated To The Extent Practicable

Before evaluating petitioners' current arguments concerning the *Milliken II* programs, it is important to begin with an understanding of what the court of appeals actually decided. Petitioners argued below that, because

the *Milliken II* programs had been fully implemented, they were automatically entitled to be relieved of their responsibility to fund those programs. Drawing on this Court's decisions in *Dowell* and *Freeman*, the court of appeals rejected that contention. That holding was correct.

In *Dowell*, this Court held that a desegregation decree may be terminated only upon proof by the party seeking termination that it has "complied in good faith with the desegregation decree since it was entered," *and* that "the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." 498 U.S. at 249-250. In *Freeman*, the Court held that a district court also has discretion to order partial termination of a decree when a party makes similar showings with respect to the part of the decree sought to be terminated. 112 S. Ct. at 1445-1446. Under *Freeman*, the burden of proof is on the party seeking partial termination. If racial segregation has previously been found to have caused a particular condition, the party seeking a declaration of partial unitariness must show that any current manifestation of that condition "is not traceable, in a proximate way, to the prior violation." *Id.* at 1447.

Thus, *Dowell* and *Freeman* establish that a party seeking to terminate part of a decree cannot rest merely on a showing that the party has implemented that part of the decree. Such a party must also show that the effects of the violation sought to be remedied by that part of the decree have been eliminated to the extent practicable. In this case, the *Milliken II* programs that petitioners sought to terminate were designed to remedy a system-wide reduction in achievement attributable to prior unlawful racial segregation. 639 F. Supp. 19 (W.D. Mo. 1985). To obtain the relief they sought, petitioners were required to show initially, not only that the *Milliken II*

programs had been fully implemented, but also that the systemwide reduction in achievement attributable to prior segregation had, as a result, been eliminated to the extent practicable. Because petitioners did not attempt to make that showing, and instead rested solely on a showing that the programs had been implemented, the court of appeals properly refused to terminate the *Milliken II* programs.

1. Petitioners seek to escape the consequences of their failure to meet the burden imposed by *Dowell* and *Freeman* by arguing (Br. 28-30) that the systemwide reduction in achievement found by the district court cannot be viewed as a vestige of segregation because it is not one of the six facets of school operations set forth in *Green* v. *County Sch. Bd.*, 391 U.S. 430 (1968). In *Green*, the Court held that vestiges of segregation may be found to exist in student assignment, faculty, staff, transportation, extracurricular activities, and facilities. *Id.* at 435. Neither *Green* nor any other decision, however, suggests that this list was intended to be exclusive. In *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18 (1971), this Court characterized the *Green* factors as "among the most important indicia of a segregated system," not as the only indicia. In *Freeman*, the Court noted that the district court had considered impaired quality of education as one vestige of segregation. 112 S. Ct. at 1446. While the correctness of that aspect of the district court's decision was not at issue, the Court commented that the district court's approach "illustrates that the *Green* factors need not be a rigid framework." 112 S. Ct. at 1446-1447.

More fundamentally, petitioners' argument that a reduction in student achievement cannot be a vestige of segregation is foreclosed by this Court's decision in *Milliken II*. In that case, the Court upheld a district

court order requiring compensatory education programs to remedy deficiencies in basic skills caused by segregation. The Court explicitly rejected the argument that, because "the constitutional violation found by the District Court was the unlawful segregation of students on the basis of race, the court's decree must be limited to remedying unlawful pupil assignments." 433 U.S. at 281. The Court explained that a remedy may seek to eliminate not only a condition that itself violates the Constitution, but also harms that "flow from such a violation." *Id.* at 282. Because the segregated system had caused minority school children to suffer significant deficiencies in basic educational skills, the Court held that the remedial educational programs were properly tailored to cure a condition resulting from the violation. *Id.* at 290.

Milliken II thus squarely holds that educational deficiencies caused by segregation constitute a vestige of a segregated school system that a court may properly seek to eliminate. Despite petitioners' assertions to the contrary (Br. 41), acceptance of their argument that educational deficiencies cannot be a vestige of a segregated school system would require this Court to overrule *Milliken II*.

2. Petitioners contend (Br. 21) that the district court never made a finding tying educational deficiencies to racially identifiable schools. That contention is incorrect.

In its initial liability decision, the court expressly found that the "inferior education indigenous [to] the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District." 593 F. Supp. at 1492. The court specifically relied on testimony that "forced segregation ruins attitudes" and that the "general attitude of inferiority among blacks produces

low achievement." *Ibid.* (citation omitted). In its remedial order, the court elaborated that "[s]egregation has caused a system wide *reduction* in student achievement in the schools of the KCMSD." 639 F. Supp. at 24. The court further found that the "education process has been * * * 'bogged down' in the KCMSD by a history of segregated education," and that "[t]oo often, as a result, a higher percentage of black students are among the lower achievers." *Id.* at 28. In recognition of this fact, petitioners themselves "proposed program components designed to increase student achievement at the elementary and secondary levels" (*id.* at 25), including most of the programs ultimately ordered into effect by the district court (*id.* at 26). Thus, as even the judges dissenting from the denial of rehearing en banc in this case stated, "[t]here is no question that the reduced educational attainment discerned by the district court in 1984 resulted from acts of racial discrimination and represented 'vestiges' of past unlawful segregation." Pet. App. A63.

3. Petitioners argue (Br. 27-32, 40) that the *Milliken II* programs exceeded the scope of the violation because they were designed to attract white students from the suburbs to the KCMSD schools and that purpose is incompatible with the district court's earlier finding that there was no interdistrict violation. As the findings discussed above demonstrate, however, the principal purpose of the *Milliken II* programs was not to attract white students from the suburbs, but, as their name implies, to remedy the effect that racial segregation has had on student achievement. 639 F. Supp. at 24-34. The

Milliken II programs are fully justified as a remedy for that violation.[2]

4. Petitioners contend (Br. 35) that the passage of time since the time of the violation shows that there is no causal link between prior segregation and current deficiencies in academic achievement. This Court noted in *Freeman* that "with the passage of time the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish." 112 S. Ct. at 1446. The same is true of educational deficiencies. The longer that remedial educational programs are in place, the less likely it is that any remaining achievement deficiencies can be traced to segregation. But that common sense proposition does not justify a conclusive presumption that, because a certain period of time has passed, the link between prior segregation and current educational deficits must have been broken.

Nothing in *Freeman* supports such a conclusion. To the contrary, that decision points in exactly the opposite direction. In *Freeman*, one issue was whether existing residential segregation could be attributed to prior school segregation, thereby warranting further remedial student assignments. Although the student assignment remedy in *Freeman* had been in effect for 17 years, the Court did not rely on a conclusive presumption that,

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[2] In ordering the *Milliken II* programs into effect, the district court also found that they would help to attract suburban and private school students to the KCMSD schools and to retain white students who remained in the system. 639 F. Supp. at 24-34. Those goals were justified by the district court's finding that *de jure* segregation in the KCMSD caused white students to leave the system. 855 F.2d at 1302. That finding is not inconsistent with the district court's earlier conclusion that the suburban districts did nothing to cause this white flight and therefore could not be included in a mandatory interdistrict remedy.

because of the passage of time alone, residential segregation could not be traced to prior school segregation. Instead, the Court noted that the district court had "examined the interaction between [the school system] policy and demographic shifts" and had found on the basis of that examination that current residential segregation was caused by factors factually unrelated to past school segregation. 112 S. Ct. at 1439, 1447.

The Court applied that same fact-intensive approach in *Dowell*. There, the school board sought a declaration of unitary status to permit the termination of a busing remedy and a return to neighborhood schools. The Court noted that one issue bearing on whether such relief should be granted was whether continuing residential segregation was the product of past school segregation or was instead the result of recent private decision-making and economics. 498 U.S. at 250 n.2. Although the school district had complied with the desegregation plan for 13 years, the Court made no assumptions about the proper resolution of that issue based on the passage of time or the school district's compliance. Instead, the Court remanded the case to the lower courts for a finding on whether residential segregation was, in fact, still a vestige of prior segregation. *Ibid.*

A conclusive presumption that the passage of time alone has eliminated the effects that segregation has had on student achievement is equally inappropriate. In *Milliken II*, this Court recognized that compensatory programs cannot be expected "to wipe the slate clean by one bold stroke." 433 U.S. at 290. Because segregation can cause serious deficiencies in basic skills, remedying those deficiencies can "require time, patience, and the skill of specially trained teachers." *Ibid.* At the time of the district court's decision in this case, the *Milliken II* programs have been completely in place for three years.

Pet. 12. It would be inappropriate to assume, without any specific factual support, that serious educational deficiencies caused by children having been educated in a segregated environment have been fully remedied in that time.

This does not mean that the programs at issue here should go on forever. Remedies in school desegregation cases are temporary. *Dowell*, 498 U.S. at 247. The "ultimate objective [is] to return school districts to the control of local authorities." *Freeman*, 112 S. Ct. at 1445. The courts below are fully aware of that. The district court has already asked the parties to submit proposals for the elimination of court-ordered funding after three, five, seven, or ten years. The court of appeals has expressly approved that time-limited approach. Pet. App. A12-A13. The lower courts are "looking forward to the day when a gradual phase-out would be considered." *Id.* at A13.

5. Petitioners contend (Br. 36, 42) that their responsibilities should be terminated now because their involvement in segregation in Kansas City was limited to actions taken by them before 1954, when segregation was mandated by state law. Accordingly, petitioners contend, the students in the system today could not have suffered from any constitutional violation committed by them.

The district court did not, however, premise petitioners' liability entirely on the pre-1954 state statute mandating segregated schools. The court also relied on the fact that petitioners had taken no action since 1954 to eliminate the vestiges of segregation in the KCMSD. 593 F. Supp. at 1504-1505. Petitioners' failure to fulfill their affirmative constitutional duty to "take whatever steps might be necessary to convert [the KCMSD] to a unitary system * * * continue[d] the

violation of the Fourteenth Amendment." *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 459 (1979).

That additional post-1954 basis for liability is significant. The district court found in 1984 that, because petitioners had failed to take steps to eliminate the dual system, black children continued to attend one-race schools and continued to suffer educational harm through 1984. 593 F. Supp. at 1492-1493, 1504-1505. Students harmed by that violation remain in the school system today.

Nor did the effects of petitioners' violation end even in 1984. The magnet school program ordered by the district court as a means to desegregate the one-race schools was not fully implemented until 1994. Many students thus continued to attend one-race schools that were vestiges of the State's violations. And the district court recently found that the magnet program has still not eliminated segregated schooling to the extent practicable. Pet. App. A129-A132. Thus, according to the district court's unchallenged findings, students in the system today have been and continue to be subjected to segregated schooling as a result of petitioners' constitutional violations.

C. The Court Of Appeals Correctly Held That Test Scores Can Be Relevant In Deciding Whether Deficiencies in Basic Skills Caused By Prior Segregation Have Been Eliminated To The Extent Practicable

1. Petitioners contend (Pet. 45) that the court of appeals has imposed a requirement that student test scores increase to a particular level as a precondition to unitary status. The court of appeals, however, has imposed no such requirement. As the author of the panel opinion explained in voting to deny rehearing en banc,

the decision stands for the more limited proposition that test results should be considered as "one factor" when deciding whether educational deficiencies resulting from prior segregation has been adequately remedied. Pet. App. A48.

That holding is correct. The district court considered test scores in finding that racial segregation had caused lowered achievement. It is logical to consider test scores in deciding whether that violation has been remedied. Test scores could be relevant in a number of ways. For example, proof that test scores improved at first, but then leveled off over time, might suggest that further improvement is impractical. Proof that test scores have risen to the same level as otherwise comparable student populations that have not been exposed to *de jure* segregation might suggest that any remaining educational deficiencies are not attributable to prior segregation. On the other hand, proof that test scores remain substantially below levels achieved by students who have not been subjected to segregation could be a significant indication that the deficiencies caused by prior unlawful racial segregation have not yet been eliminated.

Other evidence might rebut any of these inferences. But that simply proves that test-score evidence should never be viewed as conclusive. It does not show that test scores must be ignored. Here, as elsewhere, "statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short their usefulness depends on all of the surrounding facts and circumstances." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 340 (1977).

The court of appeals' holding that outcome measures should be considered, but that they should not be the sole criterion of whether discrimination has been remedied,

is consistent with this Court's decision in *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). There, the Court held that the Constitution does not compel any particular level of racial balance in the schools. The Court went on to hold, however, that because a remedial plan must be measured by its effectiveness, numerical objectives can serve as a useful starting point in shaping relief. *Id.* at 24-25. In particular, in places in which there is a history of racial segregation, school boards must show that schools that remain substantially disproportionate in their racial composition are not the product of past or present discrimination on their part. *Id.* at 25-26. A similar approach is appropriate in the context of remedying the impact of segregation on educational achievement. There is no requirement that students must reach a fixed or comparative achievement level before *Milliken II* programs may end. But when segregation has caused impaired educational achievement, evidence that students in the system continue to perform poorly when compared to others can be an important indication that the effects of discrimination persist.

2. Petitioners argue (Pet. 46-47) that because the Constitution requires equal opportunity, not equal results, focusing on student achievement is inappropriate. The question here, however, is not what the Constitution requires as an initial matter. Rather, the question is what the Constitution requires as a remedy once a violation has been proven to have caused impaired educational achievement. When a State violates its duty to provide equal educational opportunity, and that violation results in lowered achievement, the State has an affirmative constitutional responsibility to remedy the consequences of that violation insofar as it practically can. *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S.

526, 537-538 (1979); *Penick*, 443 U.S. at 458-459. That standard does not mean that the State must guarantee equal results. It does mean, however, that the State must make good faith efforts to raise the skill levels of students subjected to segregation to the levels those students would have reached had there been no discrimination. *Milliken II*, 433 U.S. at 280-281. Petitioners appeared to recognize that in 1985 when they urged the district court to institute educational programs "designed to increase student achievement at the elementary and secondary levels." 639 F. Supp. at 25.

3. Finally, petitioners argue (Pet. 48) that any consideration of achievement levels necessarily holds petitioners accountable for factors beyond their control, such as poverty, crime, drug use, and lack of parental involvement. Under the court of appeals' decision, however, petitioners are responsible for continued funding of the *Milliken II* programs only if lingering educational deficiencies are attributable to segregation and only if further progress in eliminating those deficiencies is practical. If petitioners show that the deficiencies that exist today are the product of socio-economic factors unrelated to segregation, they would be entitled to the declaration of partial unitariness that they seek. Similarly, if petitioners show that further steps to address deficiencies in basic skills are unlikely to be successful or that the possible gains are marginal in comparison with their costs, the relief they seek would also be appropriate. Petitioners, however, have not offered evidence to that effect. Their assertion that factors besides segregation are entirely responsible for any continuing educational deficiencies is no substitute for proof.

Sorting out the extent to which poor achievement levels reflect the lingering effects of discrimination and

the extent to which such deficiencies result from other independent causes is not an easy task. That is also true of other inquiries in the school desegregation context. For example, in *Dowell* and *Freeman*, the Court made clear that, notwithstanding the difficulty of the inquiry, a district court must decide to what extent residential segregation is attributable to prior segregation rather than other known causes of that phenomenon, such as economics and private choice. *Dowell*, 498 U.S. at 250 n.2; *Freeman*, 112 S. Ct. at 1447-1448. With the assistance of the parties and the exercise of judgment, courts have the capacity to decide also whether current educational deficiencies have been substantially caused by prior segregation.

The only apparent alternative is to select an arbitrary period of time for the remedy to operate before it is terminated. That approach, however, would in some cases extend the remedy longer than necessary to remedy the effects of segregation, and in other cases halt the remedy before it has accomplished its purpose. The mechanical quality of that course makes it an unsuitable alternative in an area where judgment and sensitivity to factual differences are especially called for. This Court rejected such an approach in *Dowell* and in *Freeman*. It should also reject it here. *Dowell* and *Freeman* have provided an orderly and understandable framework for resolving when school desegregation remedies should be terminated. The Court should not disturb that framework.

CONCLUSION

The court of appeals' judgment with respect to the *Milliken II* programs should be affirmed.

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AMICUS CURIAE

BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF MISSOURI, *et al.*,
Petitioners,

vs.

KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR AMICI CURIAE ICELEAN CLARK, ET AL. AND LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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BRIEF FOR AMICI CURIAE ICELEAN CLARK, ET AL. AND LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICI CURIAE*

Amici Curiae Icelean Clark, Bobby Anderton, Harry Coulas, Rita E. Vinlove, Kansas City Mantel & Tile Co. and Old Westport Shopping Center are individual and business taxpayers who own property within the Kansas City, Missouri School District ("KCMSD" or "District"). These taxpayers have paid the $1.95 property tax levy imposed in this desegregation case in

1987 by the District Court that was affirmed as modified in *Missouri v. Jenkins*, 672 F.Supp. 400 (W.D. Mo. 1987), *aff'd in part and rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *aff'd*, 495 U.S. 33 (1990) ("*Jenkins II*"). KCMSD taxpayers, represented by Landmark Legal Foundation, participated as *amici* in that judicial taxation debate before this Court. *See Jenkins II*, 495 U.S. at 54 n.19 & 66. KCMSD taxpayers unsuccessfully challenged the lower courts' subsequent decisions denying full refunds to all taxpayers forced to pay this direct judicial levy and adding another court-approved $0.96 desegregation tax levy for District salary increases. These KCMSD taxpayers desire a resolution of this costly and interminable litigation; they seek return of the control of this school district from judges and lawyers to parents and taxpayers.

Amicus Curiae Landmark Legal Foundation is a non-profit, public interest law foundation headquartered in Kansas City which advocates free markets, limited government, individual rights and the constitutional principles of separated powers and federalism. In addition to representing taxpayers in this desegregation case, Landmark represented minority families and community organizations who challenged the Long Range Magnet Plan's magnet school racial quotas. This opposition ultimately led to the District Court's contingency plan relaxing these quotas which is still in effect today.

Landmark also represents parents and education reform advocates in litigation throughout the country promoting parental choice of schools and parental control of education decisionmaking.

STATEMENT OF THE CASE

In light of the important guidelines announced by this Court in *Freeman v. Pitts*, ___ U.S. ___, 112 S.Ct. 1430 (1992), the State of Missouri Petitioners (the "State") sought from the

District Court[1] a finding of partial unitary status with respect to certain *Milliken II*[2] programs established by the KCMSD, and funded primarily by the State, as a result of the remedial plan ordered by the District Court and the Eighth Circuit Court of Appeals in this unprecedented desegregation litigation. In support, the State presented evidence concerning the costly and unparalleled educational programs already implemented since 1986.

Up to this point, the lower courts had imposed a questionable "suburban comparability" standard when evaluating the educational opportunities established by the desegregation remedy and the State's fulfillment of its desegregation responsibilities. *See Jenkins*, 639 F.Supp. at 54 ("The long term goal of [the District] Court's remedial orders is to make available to all KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district."). This Court's four concurring Justices in *Jenkins II* questioned the Equal Protection Clause basis for a requirement of "interdistrict comparability." They stressed that this new standard should not be considered "a constitutional command." *Jenkins II*, 495 U.S. at 76 (Kennedy, J., concurring in part and concurring in the judgment). These Justices scrutinized the extravagant capital projects and magnet themes established by the KCMSD — but paid for primarily by the State — to meet this standard, concluding there were "strong arguments" against the constitutional validity of the comparability plan. *Id.*, 495 U.S. at 76-77.

In these post-*Freeman* proceedings, the State adduced evidence that these educational programs indeed exceeded *all* comparable suburban opportunities, and Judge Clark acknowl-

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[1] The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

[2] *Milliken v. Bradley*, 433 U.S. 267 (1977).

edged the court had "gone to great lengths to provide the KCMSD with facilities and opportunities *not available anywhere else in the country*." (Petition Appendix ("P.A.") A-115 (emphasis added).) Nevertheless, in orders bereft of any legal discussion or factual findings concerning the *Freeman* factors, the District Court denied the State's request for partial unitary relief and mandated additional state funding of more programs.

In extending the District's Long Range Magnet Plan an additional two years (with the same budgetary levels), the court found

> . . . the evidence is clear that there has been a trend of improvement in academic achievement in the KCMSD. However, the Court is not satisfied that the District has reached anywhere close to its *maximum potential* because the District is still at or below national norms at many grade levels. . . . The Court finds that the achievement data provided by the District is reliable but is not probative to the extent which the District used to make its sweeping conclusions as to academic success. Moreover, the Court finds that the studies conducted by the State are reliable but not to the extent necessary to draw the doomsayer's conclusions reached by the State with respect to the success of the magnet program.

(P.A. A-131 - A-132 (emphasis added).)

The Eighth Circuit affirmed the District Court's decision. The panel acknowledged that Judge Clark failed to "articulate explicitly even a conclusory rejection of the State's *Freeman* arguments," but nevertheless concluded he "implicitly rejected" them. (P.A. A-19.) More importantly, the Court of Appeals created a new prerequisite for unitary status: improved (though unspecified) levels of outcome-based student performance. The panel stated:

> The district court correctly observed that implementation of programs in and of itself is not sufficient. The test, after all, is whether the vestiges of segregation, here the system-wide reduction in student achievement, have been eliminated to the greatest extent practicable. The success of quality of education programs must be measured by their effect on the students, particularly those who have been the victims of segregation. It will take time to remedy the system-wide reduction in student achievement in the KCMSD schools, and the orders of the district court reflect that it is aware of this fact.

(P.A. A-20 - A-21.)

The full Court of Appeals denied rehearing on a 6-5 vote. In doing so, three judges concurring in the denial argued that those judges who would have granted the *en banc* suggestion based their decision "on a misperception of the issues in this case." (P.A. A-48.) The concurrence contended "[w]hen we deal with student achievement in a quality education program in the context of relieving a school district of court supervision, test results must be considered." (*Id.*)

Judge Beam's sharply worded rehearing dissent confirmed that the "only factor" noted by the District Court as an obstacle to unitary status for the *Milliken II* educational programs was "continued below average academic performance." (P.A. A-61.) There was no other evidence in the record challenging the sufficiency of these programs. As to the question of the KCMSD's partial unitary status, the dissent further declared:

> [T]he standard adopted by the district court and by the panel to evaluate this question misreads *Freeman* and creates a hurdle to the withdrawal of judicial intervention from public education that has no support in the law. The district court, with the approbation of the panel, embedded a student achievement goal measured by annual standardized

tests into its test of whether the KCMSD has built a high quality educational system sufficient to remedy past discrimination. The Constitution requires no such standard.

(P.A. A-58.)

SUMMARY OF ARGUMENT

The lower courts' creation of an outcome-based student achievement prerequisite for unitary status exceeds the scope of the constitutional violation in this case. It expands *Brown*'s "equal educational opportunities" mandate and cannot be countenanced by this Court's recent Equal Protection Clause precedent in *Dowell* and *Freeman*. This new standard would establish an unattainable desegregation goal premised upon failed social policy.

ARGUMENT

This important case does not require the Court to make new law, but apply well-established equitable principles under the Equal Protection Clause of the Fourteenth Amendment, in particular those desegregation guidelines recently set forth in *Freeman v. Pitts*, *supra*, and *Board of Education v. Dowell*, 498 U.S. 237, 111 S.Ct. 630 (1991). The dispositive principle in this case is that the scope of judicial remedies is defined and limited by the scope of the constitutional violation.

The courts' action below, enunciating a new unitary requirement for desegregation defendants that equates "equal educational opportunities" with "equal academic outcomes," is extra-constitutional. This new standard exceeds the scope of the constitutional violation in this matter. It goes far beyond this Court's equal protection precedent and fundamentally misreads the Court's intent in *Freeman*.

In its petition, the State correctly points out that the Court's previous inquiries into school desegregation goals and equal protection injury "have focused upon providing the *opportunity* to obtain a benefit[,] not the ultimate benefit itself." (State of Missouri, et al.'s Petition for Writ of Certiorari at 18 (emphasis in original).) The State rightfully asks the Court to consider the "uncontested opportunity level created in the KCMSD." (*Id.*)

Unquestionably, the Eighth Circuit's creation of a guaranteed academic outcome unitary requirement moves this inquiry beyond the "benefit opportunity" mandate to a judicial assessment of the benefit's performance. The benefit of extravagant and unparalleled educational opportunities clearly is being provided to all KCMSD schoolchildren equally. The problem is this: The benefit — the most intense and costly judicially supervised school desegregation program in the United States — is not producing a desired social objective, improved student performance.

But this more accurately reflects on the legitimacy of the premise underlying the courts' social policies, not on defendants' willingness to provide equal educational opportunities or otherwise rectify past violations of the Equal Protection Clause. The reality of stagnating or declining KCMSD test scores — mirrored in urban districts throughout the country, within the context of desegregation or without — challenges the policy assumption that more financial resources, more government, more judicial mandates will effect improved academic performance and resolve the crises plaguing our urban school systems. This assumption has been no more true for public education than it has been for other government benefit programs intended to reduce poverty, unemployment, homelessness, crime, drug dependency and myriad other social pathologies.

This new outcome-based unitary standard is as dangerous as it is unconstitutional. Acceptance of its underlying premise is guaranteed to produce costly failure and postpone indefinitely resolution of desegregation litigation all across the nation. This ambiguous new standard is a step in the wrong direction. The Court of Appeals' judgment creating it must be reversed.

I. THE LOWER COURTS' CREATION OF AN OUTCOME-BASED STUDENT PERFORMANCE PREREQUISITE FOR UNITARY STATUS EXCEEDS THE SCOPE OF THE CONSTITUTIONAL VIOLATION UNDER THE EQUAL PROTECTION CLAUSE.

The constitutional right at stake in school desegregation cases is "the opportunity of an education . . . available to all on equal terms." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The vindication of this right throughout an entire school district represents the attainment of "unitary" status — what one court has called "the 'accomplishment' of desegregation." *Morgan v. Nucci*, 831 F.2d 313, 318 (1st Cir. 1987). This Court has

carefully delineated the authority of courts to engage in remedial action in the desegregation context. "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." *Milliken v. Bradley*, 418 U.S. 717, 744 (1974).

The objective of *Brown* was made more specific in *Green v. New Kent County School Board*, 391 U.S. 430 (1968), where the Court ordered desegregation defendants to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." 391 U.S. at 437-38. To that end, the *Green* Court established several factors measuring racial identifiability to be used for fashioning school remedies and determining "unitary" status, *viz.*, student attendance patterns, faculty, staff, transportation, extracurricular activities and facilities. *Id.*, at 435.

The term "unitary," as defined by the Court, has not been a precise concept. *See Dowell, supra*, 111 S.Ct. at 635-36. Though it lacks a "fixed meaning or content," a court's approach to a determination of "unitary" should not be "inconsistent with the principles that control the exercise of equitable power." *Freeman v. Pitts, supra*, 112 S.Ct. at 1444. School desegregation cases "d[o] not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971).

However, the exercise of judicial power in performing that balancing is limited by the nature of the constitutional violation. Where desegregation defendants implement in good faith a plan, a court exceeds its remedial authority when it mandates additional responsiblity for unfavorable desegregation results "not attributed to any segregative acts on the part of" those defen-

dants. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436 (1976). To do so would retard the judiciary's end purpose in desegregation litigation, which is to remedy the violation and restore state and local control to school systems. *Milliken v. Bradley*, 433 U.S. at 280-81. *See Dowell*, 111 S.Ct. at 637 (judicial supervision of local school systems was intended as a "temporary measure"). "[L]ocal autonomy of school districts is a vital national tradition." *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977).

The lower courts' creation of a new unitary factor, an ambiguously defined academic performance standard based on test scores, is contrary to this equal protection precedent. It exceeds the "equal opportunity" requirement; it ignores the nature and extent of the District's past segregation; it attributes responsiblity for inadequate desegregation results to parties who have fully complied with the courts' plan by financing the most elaborate school desegregation program in history; and it assures these parties and KCMSD parents and patrons that local autonomy will not be returned in the forseeable future.

A. A New Unitary Status Requirement Of Enhanced Student Academic Achievement Would Contravene This Court's Sound *Freeman v. Pitts* Analysis.

In creating this new unitary factor, the Eighth Circuit panel reasoned thusly: To achieve even partial unitary status and meet *Brown*'s mandate for providing equal educational opportunities, desegregation defendants must eliminate the vestiges of segregation, defined here to mean a system-wide reduction in student achievement. To remove these vestiges, student achievement must increase "to the greatest extent practicable" (P.A. A-21)—or perhaps even to the District Court's vision of "maximum potential." (P.A. A-131.) Consequently, the success of quality of education programs under *Milliken II*, and defendants' compliance with the remedy, can only be measured by these programs' effect on the students. Presumably, this effect will be quantified by standardized test scores.[3]

The panel's reliance on *Freeman v. Pitts* as support for the creation of this new performance outcome standard is misplaced. In *Freeman*, this Court held that, upon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the federal court may return control to the school system in those areas where compliance has been achieved. 112 S.Ct. at 1445-46. A defendant's good faith compliance with the remedy is a consideration in determining partial unitariness because "with the passage of time the degree to which racial imbalances continue to represent vestiges of a constitutional violation may diminish, and the practicability and efficacy of various remedies can be evaluated with more precision." *Id.*, at 1446.

The *Freeman* Court acknowledged that the lower courts had "considered an additional factor not named in *Green*: the quality of education being offered to the white and black student populations." *Id.*, at 1437. The parties had considered this factor a "legitimate inquiry" in determining the school district's compliance with the remedy in its allocation of resources. *Id.*, at 1446. The Court saw no "need" to "examine" this aspect of the case "except as it underscore[d] the school district's record of compliance in some areas but not others." *Id.*

It is from this limited recognition of the less-than-rigid framework of *Green*, and the uses of equitable discretion, that the Eighth Circuit molds a new post-*Green* requirement that a desegregation plan's "quality of education" must increase stu-

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[3] With outcome-based education on Missouri's horizon, the role of tests and assessment methodologies in measuring the State's and the KCMSD's compliance with this new standard becomes even more ambiguous. *See* Argument I.B., *infra*, at 17 n.4.

dent academic performance. But this is not what happened in *Freeman*, nor can this new standard be fairly implied from this benign langauage. *Freeman*'s "quality of education" approach was used to evaluate, and ensure, the school district's equal allocation of resources. This concept was used in the service of determining a defendant's compliance with the *Green* factors; it was not an independent factor establishing a new set of desegregation responsibilities.

More importantly, the *Freeman* Court's use of this factor in assessing the allocation of financial inputs among black and white students certainly does not lead to the creation of a unitary requirement assessing the academic outcomes of black and white students. The State of Missouri has allocated substantial resources equally among KCMSD students to establish educational facilities, programs and opportunities "not available anywhere else in the country." (P.A. A-115.) The State satisfies the *Freeman* Court's inquiry on this count.

The Eighth Circuit's attempt to equate "quality of education" with desired academic outcomes resembles the lower courts' attempt in *Freeman* to thwart a partial unitary finding based upon racial balancing. There, this Court declared:

> Racial balance is not to be achieved for its own sake. . . . "[I]n the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."

Id., at 1447 (quoting in part *Swann, supra*, 402 U.S. at 32). The Court continued:

> Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical

> ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. To attempt such results would require ongoing and never-ending supervision by the courts of school districts simply because they were once *de jure* segregated.

Id., at 1448.

Likewise, the Eighth Circuit's desire to visit urban students' academic performance problems on desegregation defendants who have complied with judicial remedies places constitutional implications on conduct that invokes none. There can be no reasonable claim that recent KCMSD student performance has suffered due to a lack, or unequal allocation, of resources or compliance with the remedy. The Equal Protection Clause does not command the achievement of any level of student test scores "for its own sake" any more than it commands a specified level of racial balance.

"The vestiges of segregation that are the concern of the law in a school case may be subtle and intangible but nonetheless they must be so real that they have a causal link to the *de jure* violation being remedied." *Id.* It is simply not always the case that outside forces "bear any real and substantial relation to a *de jure* violation." *Id.* As we are to see below, the complex external forces that affect student academic performance do not bear a substantial relation to past segregation or efforts to remedy such through the infusion of financial resources into those school districts.

In essence, what the lower courts are saying is this: Irrespective of the racial makeup of the KCMSD — indeed even if the District were to become 60% minority and 40% nonminority — partial unitary status cannot be accomplished so long as student test scores remain below national norms, or perhaps suburban comparability. This unprecedented standard goes far beyond what this Court has said the Equal Protection Clause stands for.

It misinterprets the unitary analysis progress made in *Dowell* and *Freeman*. It is a remedy that cannot be justified as advancing the "ultimate objective of alleviating the initial constitutional violation." *Freeman*, 112 S.Ct. at 1445.

B. The Revenue-Input Premise Implicit In The Lower Courts' New Outcome-Based Student Performance Standard Is Fallacious And Constitutes Judicial Legislation Of Unsound Social Policy.

The nature of the lower courts' orders "reveals that it is not a proper exercise of the judicial power." *Jenkins II*, 495 U.S. at 66 (Kennedy, J., concurring in part and concurring in the judgment). The lower courts' creation of an outcome-based performance standard for unitary status rests on a false premise permeating failed American social policy, that more money and more government solves problems.

The underlying weakness in the Eighth Circuit's outcome-based standard is exposed in a newly released book by the Brookings Institution's Panel on the Economics of Educational Reform. *See* E. Hanushek, et al., *Making Schools Work: Improving Performance and Controlling Costs* (Brookings Institution 1994). In what promises to become the definitive analysis of educational inputs and outputs, more than a dozen economists from across the country converged under the guidance of University of Rochester professor Eric A. Hanushek to review the 187 studies on educational resources. Writing for the *Harvard Journal on Legislation*, Professor Hanushek states the conclusion very directly: "There is no systematic relationship between school expenditures and school performance." E. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 Harv. J. on Legis. 423, 425 (1991). In the United States, real expenditures per pupil have risen steadily over the past two decades. After allowing for inflation, expenditures per pupil more than doubled between 1966 and 1989. During this time period, SAT scores have fallen dramatically and declines

have been registered on a variety of other tests given over this period. *Id.*, at 426.

These conclusions are confirmed in the recent "Report Card on American Education 1994" prepared by the American Legislative Exchange Council. *See Report Card on American Education 1994: A State-By-State Analysis* (American Legislative Exchange Council 1994). This comprehensive evaluation compiles statistical information from federal, state and local agencies as well as testing data and other proof. This year's survey warns: "We must face the facts, and the future, and recognize that there are serious, fundamental problems with our education system today. These problems will not be solved by increasing funding dramatically; that's been tried and, as this study confirms, it doesn't work." *Id.*, at 4. None of the ten top-performing states in terms of student achievement ranked among the top ten in per pupil education spending last year; none of these states ranked among the top ten in average teacher salaries last year. *Id.*, at 7.

The report discloses "a growing consensus that successful schools have three key qualities in common: a belief that all children can learn, and challenge their students academically; local control; and a high degree of parental involvement. These are things that money cannot buy, but that concerned communities can provide." *Id.*, at 3. Of course, that applies to concerned communities that have local control, not judicially supervised education programs.

It is particularly instructive that Professor Hanushek's work with the Brookings Institution's panel of economists involved the assessment of programs and "reforms" similar to the elements at issue in the KCMSD desegregation plan. These included improved facilities, class size and student/teacher ratios, number of advanced teaching degrees, and teacher salaries. "The results are startlingly consistent in finding no strong evidence that teacher-student ratios, teacher education, or teacher

experience have the expected positive effects on student achievement." E. Hanushek, *The Impact of Differential Expenditures on School Performance*, Educational Researcher 45, 47 (May 1989). This validates the independent conclusion that found the KCMSD remedy to be "the most extreme case to dat[e] of using money and educational choice to remedy historical segregation." A. Morantz, *Money, Choice and Equity in Kansas City: Major Investments with Modest Returns* 1 (Harvard Graduate School of Education 1994). The more than one billion dollars poured into the District for this plan has "produced only modest gains in both desegregation and academic achievement." *Id.*

We can take small comfort in the knowledge that this problem is not confined to the Kansas City desegregation case. The Brookings study states that student performance declines have been documented across the country. "School districts commonly labled 'good' — districts with adequate resources, serving relatively advantaged student populations, and free of the pressures of immigrants — have had the same sorts of performance problems as the nation as a whole." *Making Schools Work*, *supra*, at 47. The data reveals that the average minority student consistently performs less well than the typical white student, even though a modest narrowing of the gap has taken place during the past decade and a half. *Id.*, at 40. This conclusion encompasses all minority students irrespective of desegregation efforts.

A most important finding of this recent work points out that school systems — and by extension one could argue federal courts that supervise school systems — are not solely responsible for the scholastic performance of students. These other factors raise serious questions regarding the degree to which governmental institutions can improve educational performance on their own:

> Some aspects of family life and the socioeconomic environment surrounding schools have undoubtedly worsened in recent decades. The composition of families has changed dramatically, with more children living in single-parent families. The incidence of poverty among children, after falling in the 1970s, has risen to the levels of the early 1960s. Persistent welfare support has increased. Schools now compete for students' time and attention with video games, fifty or more television channels, and other attractions.

Id., at 46-47.

The evidence is conclusive. Improving academic achievement and test scores[4] is a complex matter involving multiple factors. The new standard set by the Court of Appeals cannot be attained through factors under the control of the State of Missouri or the District. It is a goal that can never be met solely in the context of this plan. Adoption of this standard will consign students, parents and taxpayers of the KCMSD to indefinite judicial supervision of their school system.

As the concurring Justices in *Jenkins II* stressed:

> [I]t is discrimination, not the ineptitude of educators or the indifference of the public, that is the evil to be remedied. An initial finding of discrimination cannot be used as the basis for a wholesale shift of authority over day-to-day school operations from parents, teachers, and elected officials to

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[4] The lower courts' unspecified level of improvement in students' academic performance appears to be tied to standardized test scores. Missouri's recent adoption of outcome-based education in the "Outstanding Schools Act," Senate Bill 380 (R.S.Mo. 1993), which proposes new performance standards and assessment schemes, will make achievement of this objective even more ambiguous. *See Academic Performance Standards for Missouri Schools: An Interpretive Guide* (Missouri Department of Elementary and Secondary Education, May 1994). The statute itself states: "The assessment system . . . shall not include existing versions of tests approved for use pursuant to the provisions of section 160.257, RSMo, nor enhanced versions of such tests." Section 4.1, Senate Bill 380.

> an unaccountable district judge whose province is law, not education.

495 U.S. at 77 (Kennedy, J., concurring). There was a further warning: "A remedy that uses the quality of education as a lure to attract nonminority students will place the District Court at the center of controversies over educational philosophy that by tradition are left to this Nation's communities." *Id.*, at 76.

These Justices were prescient. With the Eighth Circuit's new outcome-based unitary prerequisite, this judicial controversy over educational philosophy has arrived.

CONCLUSION

The judgment of the Court of Appeals creating an outcome-based student achievement prerequisite for unitary status under the Equal Protection Clause should be reversed.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*

All of the *amici curiae* are organizations that engage in advocacy on behalf of children, particularly minority and disadvantaged children. The groups pursue their advocacy in a variety of ways. Some specialize in education advocacy while others work in several issue areas. Some use court litigation as a prime means of protecting

the interests of children while others emphasize legislative advocacy, developing and implementing programs of education and training, or other types of community service and action.

Although their methods of operation are diverse, the *amici* share a common objective, to assure that all children in this nation have an opportunity to develop to their full potential and to become contributing citizens in our society.

In pursuing this common goal, all of the *amici* have been assisted materially by this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), ("*Brown I*") and by the remedy decisions in the years that followed. *Brown* articulated a broad constitutional principle forbidding the denial based on race of equal educational opportunity and sought to remove the long-entrenched barriers posed by enforced racial segregation in public schools. The remedy decisions (which in some cases came almost a quarter of a century after *Brown*) gave content to the principle of equality and brought forth practical measures to redress discrimination.

However, while important progress has been made in eliminating the barriers imposed by discrimination, it is clear to *amici* that many children still suffer its effects.

The concern that prompts *amici* to file this brief is that the object of State petitioners in this case is to persuade this Court to adopt a rule which would exclude from judicial consideration information about the extent to which students suffering educational deficits that are linked with segregation are being assisted effectively in making up this lost ground. In its place, petitioners seek a rule that would terminate a State's obligation if it had made required financial contributions to educational improvements for some specified time, regardless of the effectiveness of the remedy or the need for modifications.

In the view of *amici*, the adoption of such a rule would curtail the promise of the *Brown* decision and condemn

hundreds of thousands of children to lives and opportunities stunted by the legacy of discrimination.

The individual missions of the *amici* are as follows:

The National Urban League, Inc., ("League") founded in 1910, is the premier organization in America combining social service and civil rights. The League is a nonprofit, non-partisan community-based organization headquartered in New York City, with 113 affiliates in 34 states and the District of Columbia. The purpose of the League is to assist African Americans in the achievement of social and economic equality—a mission it pursues through advocacy, bridge building, program services, and research.

Today, the League continues to provide assistance in traditional areas of concern, such as education, employment, housing, and social welfare, and has become a leader in a number of new areas, such as development for African American males. The priorities of the League include a renewed emphasis on support for inner city children and on equipping parents and community leaders to become informed consumers and effective advocates for the education of their children. To accomplish its goals, the League's approach has been to utilize fully the tools of advocacy, research, program service, and bridge building. The result has been an organization with strong roots in the community, which serves more than a million individuals each year.

The Children's Defense Fund ("CDF") exists to provide a strong and effective voice for the children of America, who cannot vote, lobby, or speak for themselves. CDF pays particular attention to the needs of poor, minority, and disabled children. CDF's goal is to educate the nation about the needs of children and encourage preventive investment in children before they get sick, drop out of school, suffer family breakdown, or get into trouble.

CDF focuses on issues of health, education, child welfare, mental health, child development, adolescent preg-

nancy prevention, family income, and youth employment. CDF's main office is in Washington, D.C. CDF maintains state offices in Minnesota, Ohio and Texas, and local project offices in Marlboro County (South Carolina), the District of Columbia, Cleveland, Cincinnati, and New York City. CDF is a private nonprofit organization supported by foundations, corporate grants and individual donations.

The National Association for the Advancement of Colored People ("NAACP"), established in 1909, is the nation's oldest and largest civil rights organization. Its principal objectives include achieving equality of rights and eliminating race and ethnic prejudice among all people in the United States; removing all barriers of racial discrimination through democratic processes; and securing the exercise of constitutional rights and the protection of civil liberties and personal dignity. The NAACP has more than 500,000 members with more than 2,100 branches in the 50 states, the District of Columbia and abroad. NAACP membership includes parents of children who attend school in Kansas City, Missouri, as well as in scores of other school districts implementing court ordered desegregation plans.

Equal educational opportunity for minority group citizens, particularly African-American youth, has been one of the fundamental goals of the NAACP since its founding. As epitomized by its role in the landmark *Brown* decision, the NAACP historically has been a leader in litigating school desegregation cases and related constitutional and civil rights issues in public education. Currently, the NAACP is a party in numerous cases across the country which address issues of equality of opportunity and quality education in public school systems.

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage

of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For focuses much of its activity on promoting the interests of children in our nation's public schools, ranging from sponsoring educational programs to enhance citizenship and promote tolerance to assisting parents through litigation and other means to protect their children's freedom to learn. People For also has been actively involved in efforts to combat discrimination and promote equal rights, such as participating in civil rights litigation and legislation and conducting programs and studies directed at reducing problems of bias, injustice and discrimination.

The Missouri Association for Social Welfare ("MASW") is a private non-profit citizens' association dedicated to research on social policy issues, community organization, and coalition building, and public education and information. It has operated continually in Missouri since 1901. MASW's current social policy priorities are hunger, homelessness, welfare, criminal justice, health, and children's health. MASW has a longstanding interest in human rights and was one of the key leaders in creation of the Missouri Human Rights Commission in 1959. In recent years, MASW policy initiatives have included passage of a children's anti-hunger bill, advocacy for accelerated implementation of the Early and Periodic Screening, Diagnosis and Treatment Program (EPSDT), a federal children's health initiative, and other work to provide for the basic needs of children and families.

Citizens for Missouri's Children ("CMC") is a statewide organization established to be an independent voice for Missouri's children on issues, policies and government programs which affect their lives. CMC was founded in 1983 and is supported by individual contributions, memberships, corporate gifts and foundation grants, but accepts no government funding. CMC safeguards the rights of children and promotes a better quality of life for them. As a citizens' organization, CMC's job is to bring together the public and private sectors to develop a planned sys-

tematic approach that will result in more efficient and effective public services for children, to hold public officials accountable, and to mobilize individuals and groups to advocate on the behalf of children.

The Missouri Association for the Education of Young Children ("AEYC-MO") is committed to promoting quality programs and services for children from birth through age eight. The Association seeks to foster professional development opportunities for early childhood educators and child care professionals throughout the state of Missouri, and provides educational opportunities for teachers and child care providers in the Kansas City School District.

The Greater Kansas City Association for the Education of Young Children ("GKC-AEYC") is the local affiliate of the National Association for the Education of Young Children, a professional organization providing educational resources for adults who serve and act on behalf of the needs and rights of young children. GKC-AEYC is also affiliated with the Missouri and Kansas State AEYC Associations. GKC-AEYC is currently involved in projects such as lobbying for children's and family issues, the Week of the Young Child, and community organizations. GKC-AEYC recognizes a strong commitment to speak up on behalf of young children and their families within the Kansas City Missouri School District.

STATEMENT OF THE CASE

In the interest of brevity, *amici* incorporate by reference the counterstatements of the case included in the briefs for respondents Kalima Jenkins, et al., and the Kansas City, Missouri School District (KCMSD). We highlight here those findings and orders below that are most material to *amici's* argument concerning amelioration of educational harm to victims of segregation.

Over the course of the last decade, the lower courts in this case have wrestled with the legacy of over a

century of State-enforced segregation in the Kansas City, Missouri schools. The decisions of these courts chronicled the genesis and maintenance of a racially dual school system providing separate and inferior schools for black children, and determined that the victims of the State's and KCMSD's unlawful practices had suffered, and continued to suffer, real educational harm as a result. *See, e.g., Jenkins v. Missouri*, 593 F. Supp. 1485 (W. D. Mo. 1984); *Jenkins v. Missouri*, 639 F. Supp. 19 (W. D. Mo. 1985); *Jenkins v. Missouri*, 672 F. Supp. 400 (W. D. Mo. 1987); *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986) *cert. denied*, 484 U.S. 816 (1987); *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988); *Jenkins v. Missouri*, 949 F.2d 1052 (8th Cir. 1991); *Jenkins v. Missouri*, 11 F.3d 755 (8th Cir. 1993); *Jenkins v. Missouri*, 19 F.3d 393 (8th Cir. 1994).

The most pervasive harm to KCMSD's children from segregation, the District Court found, has been "a system wide *reduction* in student achievement in the schools of the KCMSD." 639 F. Supp. at 24 (emphasis in original). The Court observed that "[the] education process has been . . . 'bogged down' in the KCMSD by a history of segregated education. Too often, as a result, a higher percentage of black students are among the lower achievers. The cost of this undereducation is enormous." *Id.* at 28. The Court noted that on standardized achievement tests of basic skills in mathematics and reading, "only a few" of KCMSD's elementary schools achieved at or above national norms. *Id.* at 24. The deficiencies were particularly acute in reading. *Id.*

The record in the case also indicates serious shortcomings in the related areas of curriculum and teaching. For example, when the U.S. Department of Health, Education, and Welfare required KCMSD to desegregate its teaching staff in the 1970s, the District transferred its best and most capable teachers to white schools, leaving less capable teachers in predominantly black schools. Brief of

Respondents in Opposition to Certiorari ("R. Op. Cert.") at 4 (citing Tr. at 3298-99, 3304-06). Academic subjects in black schools were eliminated, with college preparatory classes, particularly in math and science, replaced with vocational courses in subjects such as "janitorial services." R. Op. Cert. at 4 (citing Tr. at 7018-21, 7338-41, Stip. 75). As the Court noted, the State's own rating system of school districts, which evaluates, *inter alia*, teacher qualifications and curricular offerings, indicated KCMSD lagged far behind all other school districts in the Kansas City area with regard to its capacity to provide a "minimally adequate education to its students." 639 F. Supp. at 26.[1]

Moreover, the District Court has found that the State's and KCMSD's segregative practices not only resulted in the provision of inferior educational opportunities to its young victims, but also created a "general attitude of inferiority among blacks . . . [which itself] produces low achievement . . . [and] ultimately limits employment opportunities and causes poverty." 593 F. Supp. at 1492.

On the matter of remedy, the District Court found, and experts of all parties agreed, that the educational deficits identified were "correctable." 639 F. Supp. at 24. The educational improvements ordered by the Court included the provision of additional counselors, librarians and library materials; additional teachers to reduce class size; professional development; an early childhood development program; a full-day kindergarten program; a summer

[1] The District Court in 1985 found that KCMSD's and the State's unlawful segregation had contributed to a decline in the District's educational rating to the lowest in the area. While all other school districts in the Kansas City area obtained the State's highest rating, indicating that they had the resources necessary to provide a minimum basic education to their students, since 1977 KCMSD alone had a lower rating. Under this accreditation system, the State classifies local school districts according to the quality and quantity of the educational program and services they offer, including teacher qualifications, class size, instructional equipment, library resources, and instructional materials. 639 F. Supp. at 26.

school program; and before and after-school programs in selected schools; as well as voluntary student transfers to specialized magnet schools and voluntary interdistrict transfers. *Id.* at 26-39.

Although ordered in 1985, these educational programs were implemented in phases and were not fully in place until 1988 or 1989. R. Op. Cert. at 14; State Petition ("Pet.") at 12. Since then, there has been progress in student achievement. In most subject areas at most grade levels, scores on standardized tests have risen, and other measures of educational progress, including attendance, graduation, and suspension rates, have shown modest improvement in recent years. *Id.*

Notwithstanding such gains, the District Court found, and the Court of Appeals affirmed, that significant educational harm to children persists in KCMSD schools. Indeed, about a quarter of the District's students remain among the lowest achieving students in the nation, and graduation rates, while improving, remain low. *Id.* at 16.

Thus, the District Court has found that while there has been "substantial" progress in desegregating KCMSD's schools, more desegregation progress is necessary and practicably attainable, and has concluded that, although "there has been a clear trend of improvement in academic achievement in the KCMSD," more progress is still to be made. *Id.* (citing App. 131). Indeed, in approving KCMSD's request for continuation of its *Milliken II* programs for the 1993-94 and 1994-95 school years, Judge Clark asserted:

> The Court does find that the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy. However, these components have not yet met these goals in their entirety. The Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time.

Id. (citing App. 112-13).

The Court of Appeals affirmed the District Court's findings that the State had not met its burden of establishing partial unitary status, noting that the evidence established that, at most, a start had been made in eliminating the vestiges of segregation in the District. The Court concluded that the "evidence in the record fell far short of establishing that such vestiges had been eliminated to the extent practicable." *Id.* (citing App. 19).

SUMMARY OF ARGUMENT

At least since this Court's unanimous decision in *Milliken II*, it has been clear that educational harm found to be linked with racial segregation of the public schools is a vestige of the constitutional violation that must be eliminated to the extent practicable before a court may declare that a school system has achieved unitary status. The claim of the State of Missouri to the contrary lacks support. While educational deficits are not explicitly listed as a "*Green* factor," this Court held in *Freeman v. Pitts* that *Green* was not a rigid framework and that other elements could be considered on an application for unitary status. In *Milliken II*, the Court established the responsibility of state and local officials to adopt remedies that go beyond physical desegregation of schools, and that address deficits in reading and other areas that are caused by racial and cultural isolation. The Court also made clear that the duty of state officials was a continuing one and that time would be required to eliminate educational deficits.

Once it is acknowledged that educational vestiges of segregation must be eliminated before unitary status can be achieved, the propriety and necessity of considering evidence concerning student achievement is apparent. Excluding such evidence would be inconsistent with remedial principles emphasizing practical results and effectiveness that this Court established in *Brown* and has followed in cases including *Green, Swann, Milliken II, Dayton II, Columbus,* and *Freeman,* ever since.

Scores on standardized tests are certainly not the only appropriate indicator. Other measures may include, for example, students' access to resources, teacher preparation, drop-out rates, college-going rates, and other factors. But academic outcomes can be excluded from consideration only at the cost of ignoring three decades of research and practical experience on the impact of desegregation remedies. The research demonstrates that desegregation and allied educational improvement measures have often worked to improve the performance of black students and over time have had a positive impact on their opportunities to go on to college and obtain good jobs. The measures that have helped produce these positive changes include early childhood education, better professional preparation of teachers, reading programs in the early grades, and other initiatives denominated as *Milliken II* relief. They also include desegregation itself and validate the use of magnet schools and other programs to increase desegregation.

While there is an unquestionable link between socioeconomic status and educational outcomes, there is striking data that the performance of poor children improves when they are placed in settings where they are integrated with nonpoor children and when they are provided with targeted educational programs. Such data confirm the utility of desegregation and *Milliken II* remedies for constitutional violations as important means for eliminating educational vestiges.

Adoption of the position urged by the State would exclude evidence that could lead to the modification and improvement of previously-approved relief. It would also lead to the curtailment of remedies before minority children had the opportunity to reap their benefits. Such a result would not be consistent with *Brown* and its progeny.

ARGUMENT

I. EDUCATIONAL HARM LINKED TO RACIAL SEGREGATION OF PUBLIC SCHOOLS IS A VESTIGE OF SEGREGATION THAT MUST BE ELIMINATED TO THE EXTENT PRACTICABLE BEFORE DEFENDANTS CAN ACHIEVE UNITARY STATUS

In their latest effort to frame the issues in this case for this Court's review, the State of Missouri petitioners assert that the appropriate criteria for determining unitary status are found within the four corners of the remedial analysis in *Green v. County School Board*, 391 U.S. 430 (1968), and that matters having to do with educational quality or student performance, not being among the explicit "*Green* factors," may not be considered in making unitary determinations. Petitioners' Brief ("P.B.") at 20.

This view of the law is clearly incorrect. As this Court said in its most recent decision concerning unitary status:

> It was an appropriate exercise of discretion for the District Court to address the elements of a unitary system discussed in *Green*, to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies to insure full compliance with the court's decree . . . [T]he *Green* factors need not be a rigid framework.

Freeman v. Pitts, 112 S. Ct. 1430, 1446-47 (1992).

Thus, for example, although not mentioned as a factor in *Green*, a court, in fashioning a school desegregation remedy and in determining whether the housing vestiges of segregation have been eliminated to the extent feasible, may consider the extent to which segregated residential patterns have been caused by past school segregation. *See Freeman*, 112 S. Ct. at 1454 (Souter, J., concurring) (citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 21 (1971)); *see also Board of Education of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 250 n.2 (1991) (discussing treatment of housing vestiges of school segregation).

The error of the State's assertion that only *Green* factors may be considered in determining unitary status becomes fully apparent when this Court's unanimous decision in *Milliken II* is examined. *Milliken v. Bradley*, 433 U.S. 267 (1977). That case involved the question at issue here—i.e., the responsibility of State and local defendants to address educational deficits associated with unlawful segregation. This Court's decision established two principles: (1) that racial segregation of public schools may bring about educational deficits that require remedies beyond physical desegregation, and (2) that the duties of defendants to deal with these deficits continue until they are eliminated insofar as is practicable.

On the first principle, the Court used as an example "habits of speech, conduct and attitudes reflecting . . . cultural isolation of minority children." The decision concluded that:

> Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. In short, speech habits acquired in a segregated situation do not vanish simply by moving the child to a desegregated school. The root condition shown by this record must be treated directly by special training at the hands of teachers prepared for that task.

433 U.S. at 287-88.

On the second principle—the continuing obligation of the defendants to correct conditions of educational inequality—the decision was very specific:

> These [educational] programs were not, and as a practical matter could not be, intended to wipe the

> slate clean by one bold stroke . . . Rather . . . the victims of Detroit's de jure segregated system will continue to experience the effects of segregation until such future time as the remedial programs can help dissipate the continuing effects of past misconduct. Reading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience and the skills of specially trained teachers . . . [These programs] are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary system.

Id. at 291 (emphasis in original).

In sum, this Court in *Milliken II* evinced a central concern with the educational disadvantage that is associated with practices of unlawful segregation. After *Milliken II*, there could be no question but that where the issue is appropriately presented, such educational deficits must be addressed in a desegregation decree and that progress in eliminating these deficits would be considered in later determinations of unitary status.

II. IN DETERMINING WHETHER EDUCATIONAL VESTIGES OF SEGREGATION HAVE BEEN ELIMINATED TO THE EXTENT PRACTICABLE, EVIDENCE CONCERNING STUDENT PERFORMANCE IS APPROPRIATE AND INDEED NECESSARY

To the extent that State petitioners acknowledge that addressing educational vestiges is an appropriate part of a desegregation decree, their claim appears to be that any obligation of the State is fully satisfied by a yearly contribution to educational improvements for a specified period of time, regardless of the effectiveness of the remedy. The State's position simply does not square with the jurisprudence of this Court since *Brown v. Board of Education*, a jurisprudence that has focused intensely on achieving practical results. Nor do the State's dour suggestions that court-approved remedies do not bring about educational change (P.B. at 48-49) square with the positive experience that many communities have had with desegregation and *Milliken II*-type remedies, experience well-documented by careful social science research.

A. Excluding Evidence of Educational Outcomes Would Be Inconsistent with the Remedial Principles Emphasizing Effectiveness and Practical Results That This Court Established in *Brown* and Has Followed to the Present Day

At least since its decision in *Brown v. Board of Education*, this Court has been centrally concerned with the damaging effects that enforced racial segregation and other denials of equal protection of the laws have on the lives and opportunities of children, and with shaping remedies in ways that will effectively redress the harm.

In *Brown I*, after delineating the ways in which educational opportunity "on equal terms" is critical to economic success and to performing the responsibiliites of citizenship, this Court quoted with approval the finding of the lower court that:

> "[s]egregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental developments of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system."

347 U.S. at 494.

In *Brown II*, the remedy decision, in establishing principles for dismantling racially dual school systems, the Court stated that equitable principles would control and stressed that equity traditionally "has been governed by a *practical flexibility* in shaping its remedies and by a facility for reconciling public and private needs." *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) ("*Brown II*") (emphasis supplied).

When this Court came to examine the sufficiency of particular proposed remedies in the 1960s and 1970s, it

became even more pointed in its emphasis on results and effectiveness. Thus, in *Green v. County School Board*, 391 U.S. 430 (1968), the Court spoke of the "heavy burden upon the [defendant] board to explain its preference for an apparently *less effective method*," the obligation of district courts to "assess the *effectiveness* of a proposed plan," and the need for courts to retain jurisdiction because "whatever plan is adopted will *require evaluation in practice*." *Id.* at 439 (emphasis supplied). The ultimate test, the Court made plain, was results:

> The burden on a school board today is to come forward with a plan that promises realistically to work and promises realistically to work *now*.

Id. (emphasis in original).

As noted in Section I, *supra*, the Court's concern with practical results continued to be manifested in its decision in *Milliken II*. That decision identified reading and speech deficiencies as specific vestiges of an unlawfully segregated system and approved remedies that the Court recognized would require "time, patience and the skills of specially trained teachers in order to dissipate the continuing effects of past misconduct." 433 U.S. at 291. It is simply not possible to read *Milliken II* in a way which excludes evidence of the impact of educational improvement programs on the performance of children from a determination of whether the educational vestiges of segregation have been eliminated to the extent practicable.

The Court's consistent focus on the practical effectiveness of remedy was manifested again in its reiteration in *Dayton II* and *Columbus* of the duties of defendants to take affirmative steps to disestablish the dual system "and its effects," and in its approval of effective systemwide remedies. *See Dayton Board of Education v. Brinkman*, 443 U.S. 526, 535 (1979) ("*Dayton II*"); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979).

The thread established in *Brown* has been extended most recently in the Court's discussion of the remedial

context in which issues of unitary status are to be considered:

> The essence of a Court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way to eliminate the conditions or redress the injuries caused by unlawful action.

112 S. Ct. at 1444.

In sum, over the past forty years, the opinions of this Court have exhibited a remarkable continuum of concern with the practical effectiveness of remedies designed to redress the devastating effects of the legalized caste system of segregation.

In applying equitable principles to the removal of educational vestiges, a variety of indicators relating both to inputs and outcomes appropriately may be used. These may include, for example, student access to resources; teacher preparation; the availability of counseling; discipline policies and rates; student tracking and ability grouping (including the proportions of minority children in special education, and gifted and talented programs); student performance on standardized achievement tests or other assessments of student performance; drop-out, grade retention, attendance, and college-going rates; and the like.[2]

The salient factors and precise contours of an effective or adequate remedy best can be determined in the context of records established in particular cases. But acceptance of the State's claim that evidence of student performance should be excluded would deprive the courts of a principal means of determining whether past injuries were in fact being redressed.

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[2] Interestingly, many of these indicators, including student performance on standardized achievement tests, were approved by the petitioners, Missouri State Board of Education, in January 1993 for use in assuring that school districts throughout the State meet State standards. Missouri School Improvement Program, *MSIP Review Procedures 1994-95* (February 1993).

B. Desegregation and Associated Educational Improvements Have Been Demonstrably Effective in Eliminating Educational Vestiges and Should Be Given an Adequate Opportunity to Work in This Case

1. Although their position on this appeal presents something of a moving target, it appears that State petitioners contend that the appropriate standard for determining whether educational vestiges of segregation have been eliminated to the extent practicable is based entirely on inputs—whether defendants contributed the resources called for by the Court for a period of time sufficient to infer that educational opportunities must have improved. See Joint Appendix ("J.A.") at 439. Standards that are based in part on measures of educational outcomes are rejected, apparently because outcomes may be influenced to some degree by non-school related factors and because the Eighth Circuit panel "simply assumed, *without any basis*, that the State could succeed in raising test scores, apparently through the continued application of massive resources". P.B. at 48-49 (emphasis supplied).

Amici leave it to the parties to explicate the consideration given by the courts below to the link between educational measures and improved test scores in this case, noting only that the District Court did find that the *Milliken II* components "have been partially successful" in implementing the goals of the desegregation remedy, Petitioners' Appendix ("P.A.") at 112-13, and that the burden of proof is on the defendant (not the plaintiffs or the court) to demonstrate that vestiges of discrimination have been cured to the extent practicable. 112 S. Ct. at 1447.

But to the extent that State petitioners are arguing that there is "no basis" for concluding that remedies of the kind implemented in this case can have a positive impact on educational outcomes, they are ignoring three decades of research and practical experience.

In the largest study of its kind, involving some 600,000 students, a report commissioned under the Civil Rights Act of 1964 found a relationship between school desegregation and improved achievement by black students. Office of Education, Department of Health Educational and Welfare, *Equality of Educational Opportunity* at 28-30 (1967). Subsequent studies reanalyzing the same data confirmed these findings and concluded that racial isolation, not simply socioeconomic segregation, was a cause of lower achievement for poor minority students, U.S. Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967). *See also* Frederick Mosteller and Daniel P. Moynihan, *On Equality of Educational Opportunity* (1972).

These studies, conducted before any widespread implementation of *Brown* had occurred in the South, received striking confirmation at the end of the 1970s. At a time of concern about stagnation and decline in the achievement of public school students, the National Assessment of Educational Progress (NAEP) reported gains in cognitive skills by black students. Between 1970 and 1980, the greatest gains in reading skills among nine-year old children, black or white, were made by black students who attended public schools in the Southeast United States. National Assessment of Educational Progress, *Three Assessments of Progress in Reading Performance, 1970-1980* (Rep. No. 11-R-01 April 1981). In addition, the only significant overall gain among the reporting groups of 13-year olds occurred for black students. *Id.* at xiii. While the NAEP study did not ascribe causes to its report of educational gains, the most notable educational change in the Southeast was the advent of widespread school desegregation, occasioned by this Court's decisions in *Green* and *Swann* and by enforcement of the Civil Rights Act of 1964.

Moreover, the implications of the NAEP study were substantiated by case studies demonstrating that in most situations where courts have ordered school desegrega-

tion, the achievement of minority students has risen, sometimes significantly, while the scores of white students remained unchanged or rose slightly. Robert L. Crain and Rita E. Mahard, *Desegregation Plans that Raise Black Achievement: A Review of the Research*, at 35-45 (1982). *See also* Janet W. Schofield, *Black and White in School: Trust, Tension, or Tolerance?* (1989).

The gains associated with desegregation have not been limited to improvements on standardized achievement tests. *Id.* In the longer term, researchers have concluded, black children attending desegregated schools are more likely to complete high school, to enroll in and graduate from four-year desegregated colleges, and to major in subjects that lead to more remunerative jobs and professions. James McPartland, *Desegregation and Equity in Higher Education and Employment: Is Progress Related to the Desegregation of Elementary and Secondary Schools?*, 42 Law and Contemporary Problems 108, 110-13, 124, 131 (Summer 1978); James McPartland and JoMills Braddock, *Going to College and Getting a Good Job: The Impact of Desegregation*, in *Effective School Desegregation* 141, 146, 150 (W. Hawley ed. 1981). Other research shows that low-income black children who receive a desegregated education have a good chance to avoid the social pathology (such as hostile encounters with the police or teenage pregnancy) that blights the prospects of many of their peers. *See* Robert L. Crain et al., *Finding Niches: Desegregated Students 16 Years Later* (Rand Corporation, Rep. R3243-NIE, 1985). *See also* Robert L. Crain and Jack Strauss, *School Desegregation and Black Occupational Attainments: Results from a Long-Term Experiment* (Center for Social Organization of Schools, The Johns Hopkins University, Rep. No. 359, July, 1985).

Just as desegregation has been linked by many studies with positive outcomes of various kinds, so, too, a body of experience and research has demonstrated that the educational improvement measures generally denominated as

Milliken II relief have brought progress. In the instant case, the *Milliken II* remedy has included an early childhood education program; measures to increase the time for instruction through means such as summer school programs, full day kindergarten, and extended day programs in selected schools; lowering class-size through the addition of teachers; and professional development focussing on desegregation and improving student achievement. J.A. at 63, 70, 72, 74. *See also* 639 F. Supp. at 35. Several of these educational components have long been associated with court-ordered desegregation. So, for example, Crain and Mahard find that the best progress through desegregation appears to have occurred where desegregation began in the earliest grades and where comprehensive programs were instituted that included diagnostic and compensatory services for children and professional development for teachers. Crain and Mahard, *Desegregation Plans, supra.*

The gains associated with *Milliken II*-type educational improvement initiatives also have been demonstrated by research into the effectiveness of these measures when taken apart from a school desegregation case. For example, studies have shown positive results stemming from the availability of preschool child development programs for three-and four-year olds. The most widely noted of these studies tracked the lives of disadvantaged children who had participated in a preschool program in Ypsilanti, Michigan in the 1960s. The children were matched with a demographically similar group of disadvantaged children who did not participate in the program. By age 19, the report noted striking differences. Those students who had participated in the program scored higher on standardized tests, were more likely to have graduated from high school, to be enrolled in college or to be employed, and were more likely to have avoided various forms of pathology. John R. Berrueta-Clement et al., *Changed Lives: The Effects of the Perry Pre-School Program on Youths through Age 19* at 34-35, 57-60 (1984). Sim-

ilar conclusions have emerged from a longitudinal evaluation of a New York State program and from evaluations of other early childhood initiatives. *See* Fern Marx and Michelle Seligson, *The Public School Early Childhood Study: The State Survey* 3 (1988); *see also A Better Start: New Choices for Early Learning* (Fred M. Hechinger ed., 1986).

Moreover, a growing body of evidence has developed regarding other promising educational initiatives on behalf of minority and disadvantaged children, including all-day kindergartens and programs designed to improve reading skills in the primary grades. *See, e.g.*, Robert E. Slavin, *After The Victory: Making Funding Equity Make a Difference*, 33 Theory Into Practice 98 (1994); Robert E. Slavin and Nancy A. Madden, *What Works for Students at Risk: A Research Synthesis*, 46 Educational Leadership 4 (1989). Researchers have found the effects of all-day kindergarten (rather than the traditional half-day) to be comparable to those of preschool in that children who participate develop language and other skills important to success in the first grade. *See, e.g.*, Nancy L. Karweit, *Effective Kindergarten Programs and Practices for Students at Risk of Academic Failure*, in *Effective Programs for Students at Risk* (Robert E. Slavin et al. eds., 1989). Effective reading programs are premised on the belief that any educational failures are rooted in and exacerbated by failure to read competently by the end of the early elementary grades. The programs often involve one-on-one tutoring, additional time before or after school, and frequent assessment of children for prompt diagnosis and treatment of reading problems. *See, e.g.*, Robert E. Slavin, *School and Classroom Organization in Beginning Reading: Class Size, Aides, and Instructional Grouping, in Preventing Early School Failure* 122 (Robert E. Slavin, Nancy L. Karweit, Barbara A. Wasik and Robert E. Madden eds., 1994); Robert E. Slavin, et al., *Whenever and Wherever We Choose: The Replication of "Success for All,"* 75 Phi Delta Kappan

639 (1994); Barbara A. Wasik and Robert E. Slavin, *Preventing Early Reading Failure with One-to-One Tutoring: A Review of Five Programs*, 28 Reading Research Quarterly 179 (1993); Nancy A. Madden et al., *Success for All: Longitudinal Effects of a Restructuring Program for Inner-City Elementary Schools*, 30 American Educational Research Journal 123 (1993); *Bridges to Literacy: Learning from Reading Recovery* (Diane E. DeFord, Carol A. Lyons and Gay Su Pinnell eds., 1991). Gay Su Pinnell, *Success for Low Achievers Through Reading Recovery*, 48 Educational Leadership 17 (1990); Gay Su Pinnell, *Reading Recovery: Helping At-Risk Children Learn to Read*, 90 Elementary School Journal 161 (1989). By ensuring that children succeed in learning to read in the early grades, schools often achieve other desirable outcomes, including a reduction in retentions in grade and in special education placements. *See, e.g.*, Slavin, *After the Victory* at 101, and sources cited therein; Carol A. Lyons, *Reading Recovery: A Preventative for Classifying Children as Learning Disabled*, 24 Urban Education 125 (1989).

Several other measures, many of which have been included in the remedy in this case, are considered by educational experts to be important to the academic success of disadvantaged children. Comprehensive, ongoing staff development programs for teachers in challenging curriculum and in effective instructional practices have improved achievement. *See* Slavin, *After the Victory* at 102, and sources cited therein; Commission on Chapter 1, American Association for Higher Education, *Making Schools Work for Children in Poverty: A New Framework Prepared by the Commission on Chapter 1* 48-55 (1992); Nancy Adelman et al., Staff Development for Teachers of Disadvantaged Students (available from Policy Studies Associates, Washington, D.C.) (June 1991). Particularly in the context of desegregation, researchers have found it important to train teachers in instructional methods that promote cooperative learning and reduce

reliance on tracking or ability grouping. *See* Janet W. Schofield, *Promoting Positive Peer Relations in Desegregated Schools,* 7 Educational Policy 297 (1993). *See also,* Anne Wheelock, *Crossing the Tracks: How "Untracking" Can Save America's Schools* (1992); Jeannie Oakes, *Can Tracking Research Inform Practice?,* 21 Educational Researcher 12 (1992). Initiatives to improve parent involvement are effective not only in helping parents to feel connected to their children's schools, but also in equipping parents to assist their children with homework and to take other steps outside of school to support high achievement. *See, e.g.,* Ron Brandt, *On Parents and Schools: A Conversation with Joyce Epstein,* 47 Educational Leadership 24 (1989); Joyce L. Epstein, *Effects on Students' Achievement of Teachers' Practices of Parent Involvement,* 5 Advances in Reading Language Research 261 (1991).

Researchers have also demonstrated the importance to disadvantaged children of measures including: school counselors and other measures to address children's health and social needs; improvements in teaching and curriculum and other "effective schools" measures; and reductions in class size. *See, e.g.,* Robert E. Slavin, *Statewide Finance Reform: Ensuring Educational Adequacy for High-Poverty Schools,* 8 Educational Policy 425, 427-28 (1994); William L. Taylor and Dianne M. Piché, *A Report on Shortchanging Children: The Impact of Fiscal Inequity on the Education of Students at Risk,* H.R. Doc. No. 36-895, 101st Cong., 2nd Sess. 25-32 (1990), and sources cited therein. *See also* Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters,* 28 Harv. J. on Legis. 465 (1991); Richard J. Murnane, *Interpreting the Evidence on "Does Money Matter?"* 28 Harv. J. on Legis. 457 (1991); David Card and Alan B. Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States* (National Bureau of Economic Research Working Paper No. 3358, 1990).

None of the foregoing is intended to suggest that initiatives of the kind discussed above may be attached to a desegregation plan simply because there is evidence that they are promising vehicles for educational progress. Clearly, findings must be made (as they have in this case) that a constitutional wrong has been committed and that the programs proposed are appropriate and necessary measures for removing the educational vestiges of segregation. Nor do *amici* argue that the educational benefits of desegregation and *Milliken II*-type remedies are uncontested. Some economists, without focusing particularly on desegregation or *Milliken II,* have conducted broad analyses suggesting that few educational expenditures yield significant results. *See, e.g.,* Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy,* 28 Harv. J. on Legis. 423 (1991) and sources cited therein at 426, n.12. But the methodology and claims of those "production function" studies have been sharply challenged. *See, e.g.,* Rob Greenwald, Larry V. Hedges, and Richard D. Laine, *When Reinventing the Wheel is Not Necessary: A Case Study in the Use of Meta-Analysis in Education Finance,* 20 Journal of Education Finance 1 (1994); Ferguson, *Paying for Public Education, supra*; Murnane, *Interpreting the Evidence, supra.*

The accumulated experience of the past three decades, as summarized above, provides strong assurance that just as racial segregation of children led to serious educational harm, so measures that alleviate segregation and address the harm associated with it can lead to practical gains for those who have suffered injury. Indeed, after analyzing data compiled by the National Assessment of Educational Progress over two decades, two noted researchers have concluded that great progress has been made in reducing the educational deficits of black children. As reported by Marshall S. Smith (now Undersecretary of Education) and Jennifer O'Day, black children born in 1971 scored an average of 189 on NAEP reading tests when they were

nine years old, 236 when they were thirteen, and 274 when they reached the age of seventeen in 1988; white children born in 1971 scored 221, 263, and 295 at the same junctures. The authors conclude:

> These are extraordinary data. By conservative estimate, they indicate a reduction in the gap between African American and White students over the past 20 years of roughly 50% when the students are 17 years old.

Marshall S. Smith and Jennifer O'Day, *Educational Equality: 1966 and Now*, in *Spheres of Justice in Education: The 1990 American Education Finance Association Yearbook* 53, 74 (Deborah A. Verstegen and James G. Ward eds., 1991). *See* National Research Council, *A Common Destiny: Blacks and American Society* 348-350 (Gerald D. Jaynes and Robin M. Williams eds., 1989) (describing an "overall pattern . . . of improvement among blacks and decline in the difference between blacks and whites").

In sum, findings of this kind refute State petitioners' suggestion that there is no basis for believing that court-approved remedies can have an impact on educational outcomes. What the State is seeking is not an end to remedies that do not work but an end to remedies that have worked in many situations without hearing evidence about their effectiveness.

2. Two other points call for brief comment. Although the magnet program was not at issue in the State petitioners' effort to end their contribution to *Milliken II* relief in the lower courts, the State's brief attempts to place magnet relief in issue in this Court. P.B. at 10-12. Lacking a record, it is difficult to know what precisely is at issue, and *amici* do not propose in this brief to review the literature on the efficacy of magnet schools as an educational remedy.

Yet it is worth noting that the objective of magnet schools is to reduce racial isolation and that desegregation has itself been demonstrated to be a valuable instrument for eliminating the educational vestiges of a dual system. *See, e.g.*, Crain and Mahard, *Desegregation Plans that Raise Black Achievement: A Review of the Research, supra*. Whether there are alternate techniques of achieving desegregation that would serve as well to eliminate the educational vestiges; whether the particular programs adopted were appropriate remedies for the violations found; and whether the principal effort was to attract or retain students from within the jurisdiction or to attract students in suburban jurisdictions (and, if the latter, whether State constitutional wrongdoers may be required to support voluntary interdistrict remedies), may all be appropriate questions for this Court to examine on the establishment of an appropriate record, assuming they have not been dealt with previously. But no basis has been established here for terminating or foreclosing magnet remedies which not only redress the unconstitutional condition of racially segregated schools but which may help to eliminate the educational vestiges of such segregation.

3. Throughout their petition and brief, State petitioners raise the link between the "nonschool" factor of poverty and student achievement as a barrier to using educational outcomes as a measure of the effectiveness of desegregation and *Milliken II* relief. Pet. at 19-20, P.B. at 48-49. At a minimum, the suggestion appears to be that the combination of school and nonschool factors that contribute to educational outcomes is so entangled that it is not possible to reach conclusions about the efficacy of particular school initiatives. Beyond that, in arguing that there is a lack of basis for the belief that the "state could succeed in raising test scores," State petitioners appear to be contending that educational interventions on behalf of minority students who are poor are bound to be unavailing.

Neither suggestion withstands scrutiny. The research cited above that finds a link between desegregation or par-

ticular educational initiatives and positive outcomes has been carefully conducted to assure the validity of the conclusions. So, for example, longitudinal studies that have examined the long term effects of desegregation and early childhood education have included as control groups children of the same socio-economic status. *See* Crain and strauss, *School Desegregation and Black Occupational Attainments, supra*; Berrueta-Clement et al., *Changed Lives: The Effects of the Perry Pre-School Program on Youth Through Age 19, supra.*

Moreover, the same national research that shows that schools with high concentrations of poverty provide adverse environments for learning also shows that equally poor children in low-poverty schools perform significantly better. The most recent study finds that 30 percent of poor children in schools with a high concentration of poverty score in the lowest tenth percentile, three times the percentage of equally poor children who are in schools with a low proportion of students living in poverty. In contrast, poor children in low-poverty schools score in the top half at almost twice the rate as poor children in high-poverty schools. *See* U.S. Department of Education, *National Assessment of the Chapter 1 Program: The Interim Report* 160 (1992). While studies such as these confirm the debilitating effects of poverty, they also validate the efficacy of desegregation and other initiatives that improve the environment for learning.

CONCLUSION

State petitioners emphasize the length of the legal struggle over remedies for segregation in KCMSD's schools, and base much of their appeal on the presumed desirability of attaining closure in this case. It is true that four decades have passed since the *Brown* decision and, as State petitioners note, that the *Jenkins* litigation has been in Court for seventeen years. Pet. at 12. But it is not the fault of the plaintiff class that *Brown* was not implemented

in most places for more than a decade, that the principles governing the constitutional obligations of States and school districts in the North and West were not established until 1973, that key aspects of remedy law were not identified by this Court until 1977, and that children in some jurisdictions in this nation have not reaped the benefits of the *Brown* decision to this day. Indeed, as the State concedes, the *Milliken II* aspects of remedy in Kansas City were not "fully in place" until 1989, Pet. at 12, and, as respondents assert, some aspects of remedy have not yet been fully implemented.

In the view of *amici,* it would be perverse in the extreme if difficulties and long delays in affording relief occasioned largely by entrenched racial attitudes and practices were to become the unspoken basis for curtailing future remedy.

In the past, decisions of this Court have gone astray when they have cast aside information on the impact of laws on human lives in favor of formulaic principles ungrounded in facts. For example, in *Plessy v. Ferguson,* 163 U.S. 537 (1896), this Court created a fiction, unsupported by sociological research or practical experience, that if racial segregation laws stamp black citizens with a badge of inferiority, it was "solely because the colored race chooses to put that construction upon it." 163 U.S. at 550.

In this case, the State petitioners ask the Court to discard experience and research on the impact of educational remedies in favor of a rule that would curtail redress on the application of arbitrary criteria. As in *Plessy,* application of such a rule would leave without a remedy many persons who have suffered constitutional harm. *Amici* respectfully urge that this Court employ the equitable test of practical effectiveness that it has applied consistently since *Brown,* to assure that all relevant evidence on the impact of court-approved remedies will be considered before unitary status is declared. Only if this is done

will children have the prospect of realizing the "delayed benefits of a unitary system" promised in *Milliken II*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,

Petitioners,

—v.—

KALIMA JENKINS, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF WESTERN MISSOURI, THE AMERICAN JEWISH CONGRESS, THE ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, THE NATIONAL WOMEN'S LAW CENTER, AND THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Western Missouri is its local affiliate with offices in Kansas City, Missouri. The ACLU and its affiliates have been deeply involved in the effort to desegregate America's schools and to remove the vestiges of prior, *de jure* segregation. As part of that ongoing effort, the ACLU served as counsel in *Freeman v. Pitts*, 503 U.S. __, 112 S.Ct. 1430 (1992), this Court's most recent school desegregation decision.

The American Jewish Congress (AJC) is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews. Beginning long before *Brown v. Board of Education*, AJC has participated in cases involving the desegregation of the nation's public schools.

The Asian American Legal Defense and Education Fund (AALDEF) is a nonprofit civil rights organization dedicated to defending the rights of Asian Americans through litigation, community education, and advocacy to shape public policy in the areas of voting rights, immigrants' rights, employment and labor rights, and environmental justice. AALDEF currently represents victims of anti-Asian violence and Japanese Americans who were incarcerated in U.S. camps during World War II.

The National Women's Law Center (Center) is a nonprofit legal advocacy organization dedicated to the ad-

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

vancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life, with a special emphasis on promoting equal opportunity of education for girls and women. Since 1972, the Center has actively participated in litigation to secure the rights of women and has participated in major Supreme Court cases addressing women's right to equal protection under the law.

The Puerto Rican Legal Defense and Education Fund (PRLDEF) exists to ensure that every Puerto Rican and other Latino is guaranteed the opportunity to succeed. Through advocacy, education and litigation, PRLDEF seeks to secure and safeguard the political, economic, social and legal rights of our community. We will succeed when Latinos enjoy full and equal participation in American society. Over the 22 years since its founding PRLDEF has initiated hundreds of cases to combat discrimination in education, voting rights, employment and housing. PRLDEF has successfully argued landmark cases including several in the United States Supreme Court.

STATEMENT OF THE CASE

An historical context is necessary to understand the current posture of this case. In 1984, the district court held that the respondent Kansas City, Missouri School District (KCMSD) and the petitioner State of Missouri (Missouri) were liable for segregation in KCMSD. *Jenkins v. Missouri*, 593 F.Supp. 1485 (W.D.Mo. 1984). In discussing the racial composition of the schools within KCMSD, the district court found that "vestiges of [the former] dual system still remain." *Id.* at 1493. Of particular relevance here, the court found that "the inferior education indigenous of the state-compelled dual school system has lingering effects in [KCMSD]." *Id.* at 1492. Not surprisingly, the district court

also found that this "inferior education" had "produced low achievement." *Id.* Each of these findings was supported by specific evidence in the record. Perhaps for that reason, "[t]he State did not appeal [the 1984] decision . . . and that holding is not challenged here." Brief for Petitioners at 7, n.8. The parties were then ordered to propose remedies for the constitutional violations the district court had found. 593 F.Supp. at 1506.

At the remedy stage, all parties, including Missouri, proffered remedial plans that involved educational enhancements. "Both the State of Missouri and the KCMSD have proposed program components designed to increase student achievement . . . ." *Jenkins v. Missouri*, 639 F.Supp. 19, 25 (W.D.Mo. 1985). For example, "both the State of Missouri and the KCMSD endorse[d] achieving AAA status [a state evaluation of the quality of education], reducing class size at the elementary and secondary level, summer school, full day kindergarten, before and after school tutoring and early childhood development programs." *Id.* at 26. Moreover, at least one of these programs, achieving AAA status, was proposed by Missouri as well as the KCMSD "to regain and maintain a quality education program . . . [and] to assist in attracting and maintaining non-minority enrollment." *Id.* at 27.

In determining which plans to adopt, the district court made clear that its "goal [was] the elimination of all vestiges of state imposed segregation." *Id.* at 23. The court acknowledged that its "broad equitable powers" were limited by "the nature and scope of the constitutional violation, the interests of state and local authorities in managing their own affairs consistent with the Constitution, and insuring that the remedy is designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 23. Pursuant to those broad but limited powers, the court accepted some proposed pro-

grams and rejected others. In some instances, such as the early childhood development program, the district court rejected the KCMSD plan and accepted that proposed by Missouri. *Id.* at 32. In making its decisions, the court repeatedly stated that its goal was to "to improve the academic achievement of students within KCMSD, both as a remedial measure and to maintain and attract non-minority enrollment . . . . " *Id.* at 31. Recognizing its obligation to consider alternative remedial measures, however, the court adopted this approach only after concluding that "mandatory student reassignment" would not be effective. *Id.* at 38.

Missouri did not challenge many of these orders on appeal. *Jenkins v. Missouri*, 807 F.2d 657, 682, 683 (8th Cir. 1986). For example, Missouri did not challenge the order requiring that AAA rating be achieved throughout KCMSD, regardless of whether it affected non-minority children as well as minority children. Similarly, Missouri did not challenge the goal identified by the district court -- namely, to improve educational achievement in order to remedy past harm to achievement and in order to attract non-minorities into the district. Instead, Missouri focused its appeal on those aspects of the district court's remedial plan that the state, alone, was required to finance. *Id.* at 682. In an *en banc* decision, the Eighth Circuit adjusted some of the funding formulas to reassign more of the costs to KCMSD. However, the Eighth Circuit unanimously affirmed the propriety of an educational enhancement remedy in this case. *Id.* at 682-86. In addition, the court of appeals expressly rejected arguments that one part of the remedy (voluntary interdistrict transfers) was, in part, imposing "an interdistrict remedy for an intradistrict violation." *Id.* at 683.

Despite the Eighth Circuit's 1986 rulings, the district court found that for the following seven years Missouri "opposed the implementation of any program offered to desegregate the KCMSD . . . ." *Jenkins v. Missouri*, Order, April

16, 1993, at 2. The district court further noted that "the State has *never* offered the Court a viable, even tenable, alternative and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD." *Id.* (emphasis in original).

In 1992 and 1993, Missouri opposed the continuation of some of the education programs ordered by the district court. The district court largely rejected that opposition and the court of appeals affirmed. *Jenkins v. Missouri*, 11 F.3d 755 (8th Cir. 1993). The court of appeals noted that the goal of educational improvement to remedy past educational deficits and attract non-minority students had been set in the liability and remedy orders. *Id.* at 759. The court of appeals also concluded that the district court had implicitly found that vestiges of segregation remained in KCMSD and it affirmed that finding as well. *Id.* at 762. As the Eighth Circuit observed in its 1993 decision: "The only evidence before the district court with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made." *Id.* at 765. Finally, in "a few further words," the court of appeals noted that the appropriate measure of any desegregation remedy is its effectiveness in eliminating the vestiges of segregation. *Id.* at 765-66.[2]

In a petition for *en banc* review, Missouri argued that the court of appeals had set a new and improper goal by insisting that test scores in KCMSD must reach some unspecified level for unitariness to exist. *Jenkins v. Missouri*, 19 F.3d 393 (8th Cir. 1994). Significantly, however, the authors of the panel opinion rejected that interpretation of

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[2] The district court and the court of appeals also addressed Missouri's objections to ordered salary increases for KCMSD personnel. *Amici* do not address this portion of those orders.

their prior decision, which they construed as holding only that test scores were *a* relevant criterion in measuring the effectiveness of a desegregation remedy. *Id.* at 395.

Meanwhile, the district court began the process of providing for the orderly termination of this case. Order, April 16, 1993. The court found that as a result of the desegregation remedies in this case there had been "substantial progress toward desegregating the schools." *Id.* at 8. The court also found that "there has been a trend of improvement in academic achievement in the KCMSD" but that more was practical and feasible. *Id.* at 11. In response to additional programs proposed by both KCMSD and plaintiffs, the district court noted that "it is time that the District be subject to a very definite reality check" and that the district could simply not "dream" up new programs. *Id.* at 13. Accordingly, KCMSD was ordered to provide a plan for funding education in Kansas City when "the court ordered funding would be withdrawn." *Id.* at 21. Thus, contrary to the impression conveyed by Missouri, this case now comes before the Court as it is moving toward its conclusion.

SUMMARY OF ARGUMENT

In the district court and the court of appeals, and to a large extent in its petition for *certiorari* in this case, Missouri relied primarily on its claim that it had eliminated all vestiges of segregation that it had caused because it had provided sufficient funds to Kansas City to make expenditures at least as high as in surrounding districts. That, Missouri argued, was all it had to do. Although in those courts, and in this Court, Missouri purported to be arguing a simple application of existing law, the argument was instead a fundamental challenge to the long-established principle of *Brown v. Board of Education*, 349 U.S. 294 (1955)(*Brown II*), *Green v. School Board of New Kent County*, 391 U.S. 430

(1968); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and other cases that compliance has been achieved not when a remedy has been instituted but when that remedy has been effective.

In its brief on the merits in this Court, though Missouri still professes to be simply applying existing law, it goes even farther in a fundamental challenge to the entire structure of desegregation law. The district court found that segregation had caused a drop in educational achievement. Missouri and all other parties had initially proposed remedies designed to improve educational achievement and to attract additional non-minority students. The district court found that those remedies were working in eliminating the vestiges of segregation and attracting non-minority children. Missouri concedes that this conclusion was a reasonable one. Brief for Petitioners at 19, 21. Nevertheless, Missouri argues -- for the first time -- that the entire remedial concept in this case is improper as a matter of law. That remedy, Missouri notes, is designed to achieve two goals, to improve educational achievement and to attract non-minority children. Missouri challenges the legitimacy of both goals in this case.

Missouri's principal challenge is to the goal of improving educational achievement. It argues that educational deficits cannot, as a matter of law, ever be considered vestiges of segregation, a principle rejected in *Brown v. Board of Education*, 347 U.S. 483 (1954)(*Brown I*), and thereafter. It argues that nothing but the factors identified in *Green* can be considered a vestige, a principle rejected most recently in *Freeman v. Pitts*, 503 U.S. __, 112 S.Ct. 1430 (1992); *see also id.* at 1454, n.1 (Souter, J., concurring). Here, the district court specifically found that deficiencies in student achievement caused by segregation remain. Despite this finding, Missouri argues that because 40 years have elapsed

since *Brown*,[3] the Court should hold as a matter of law that, regardless of the evidence, no court can find vestiges of depressed achievement. If adopted, the principle that time has erased all vestiges of segregation cannot be limited to achievement. Taken to its logical limit, it would open up every school desegregation case to a motion to dismiss on the grounds that no vestiges can possibly remain as a matter of law.

Missouri also argues that the goal of attracting non-minority white children from private schools and from the surrounding suburbs is improper, as a matter of law, based on the principle of *Milliken v. Bradley*, 418 U.S. 717 (1974) (*Milliken I*), that an intradistrict violation cannot form the basis of a interdistrict remedy. In *Milliken I*, the Court held that parties, such as suburban districts, that had not violated the Constitution, could not be required to participate in a remedy to cure the violation. However, in *Hills v. Gautreaux*, 425 U.S. 284 (1976), the Court expressly rejected the interpretation of *Milliken I* that Missouri now advances. As the *Gautreaux* Court explained, the error of the district court in *Milliken I* was not in ordering relief that had effects beyond the borders of Detroit, but in ordering remedial actions by parties who were not found to have caused any violation. In this case, the remedy order may have effects beyond the borders of Kansas City, but it does not order actions by any parties other than those found to have violated the law. Missouri's argument would thus amount to a wide expansion of the *Milliken I* holding and an explicit overruling of *Gautreaux*.

Finally, Missouri argues that even if the goals of the remedy order are acceptable, the remedy order is broader

[3] As KCMSD notes in its brief, the remedy in this case was only fully implemented three years ago, not 40.

than necessary to cure the violations on several grounds. First, Missouri argues that the remedy is overbroad because it is expensive, a proposition contradicted by *Swann*. Second, Missouri argues that the remedy is overbroad because it benefits white children as well as minority children. This may be true but, as the district court noted, Missouri has failed to offer a practical method of achieving the twin goals of the remedy without affecting white children in the district. Third, Missouri argues that one of the measures to be used to determine compliance -- *i.e.*, that test scores must reach national averages -- is improper because it is unattainable and because it requires curing at least some educational deficits that were not caused by segregation. To the extent the lower courts were to hold that test scores must reach national averages, regardless of whether that improvement was necessary to cure constitutional violations, they would be in error, violating the causation principles most recently reiterated in *Freeman*. However, neither the district court and the court of appeals have so held. Rather, they have held that test scores are relevant in determining if all vestiges of depressed educational achievement have been eliminated. To hold that test scores are irrelevant, as a matter of law, because improvement is unattainable or for any other reason would not only reject the long-established principle that remedies must be effective, but would also have this Court definitively resolve questions of educational methodology best left, in the first instance, to the district courts after an evidentiary hearing.

Thus, although Missouri has couched its argument in the guise of application of existing law, it is instead a request for a radical revision of existing law. No reasons are suggested for this Court to reverse the long-standing principles of school desegregation law and none could be. The district court's most recent opinions in this case have shown its sensitivity to the need to bring this case to an end upon

elimination of the vestiges of segregation in KCMSD. This Court's intervention is not needed to accomplish that goal. More generally, lower courts throughout the country are bringing school desegregation cases to a conclusion, as evidenced by the decreased number of such cases and the increasing findings of unitary status. But, where district courts find that vestiges of segregation do remain, this Court should not hold as a matter of law that those district courts were wrong, and dismantle desegregation remedies that are proving effective. For this Court to do so would send a powerful and unfortunate signal that this Court has abandoned its demand that all state-imposed segregation end.

ARGUMENT

I. THE PRINCIPLES OF SCHOOL DESEGREGATION LAW ARE WELL ESTABLISHED

In 1954, in what is now recognized as one of this Court's finest moments, the Court held that segregation in schools on the basis of race was a violation of the Equal Protection clause of the Constitution. *Brown I.* From the very beginning, the Court acknowledged that one of the consequences of segregation had been a loss in student achievement. *Id.* at 494 (segregation retards the "educational and mental development" of its victims). The Court ordered segregation ended. The Court recognized that different methods of desegregation would have to be employed based on the different conditions in different areas of the country and deferred to district courts more knowledgeable of those conditions. *Brown II.*

In *Green v. School Bd. of New Kent County*, 391 U.S. 430, the Court reemphasized the need to tailor remedies to local conditions. *Id.* at 439; *United States v. Montgomery*, 395 U.S. 225 (1969). The Court also clarified two important principles in the area of school desegregation. First, segregation was to be eliminated in all of its manifestations "root and branch." 391 U.S. at 438. Student assignment was not the only manifestation, or vestige, of school segregation. Others existed and the Court identified some of them. *Id.* at 435. Second, the Court held that the measure of a remedy in school segregation was its effectiveness in curing the conditions of segregation. *Id.* at 439; *Raney v. Board of Education*, 391 U.S. 443 (1968); *Monroe v. Board of Commissioners*, 391 U.S. 450 (1968).

In *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1, the Court addressed the scope of permissible remedies to cure segregation. The Court found that the district courts had "broad remedial powers" to cure segregation. *Id.* at 27. The Court found all of the remedies proposed within the court's authority.[4] The Court identified two limitations on the breadth of possible remedies -- the remedy must relate to a current condition of segregation caused by past segregation and it must be practical. *Id.* at 16, 31. The Court repeated its observations in *Brown* and *Green*: "In this area, we must of necessity rely to a large extent, as this Court has for more than 16 years, on the informed judgment of the district courts in the first instance and on the courts of appeals." *Id.* at 28. In *Davis v. Board of School Commissioners*, 402 U.S. 33, 37 (1971), the Court repeated that "a district court may and should consider the use of all available techniques . . . . The measure of any desegregation plan is its effectiveness." *Id.* at 37.

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[4] The Court explicitly held that it was not creating new principles applicable only to a school desegregation case. The remedial authority of the district courts in school desegregation cases was inherent in equity and "a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right." 402 U.S. at 15-16.

Therefore, the structure of school desegregation law as of 1971 had established three principles relevant to this case. First, the Court will, to a large extent, defer to district courts in their choice of remedies. Second, the district courts have broad discretion in framing a remedy so long as it is related to a current condition of segregation caused by past segregation and is practical. Third, the remedy adopted by the district courts has to be effective in curing the condition of segregation.

The remaining desegregation cases in the 1970's applied and reaffirmed these principles. Thus, in *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972); *Milliken v. Bradley*, 433 U.S. 267 (1977)(*Milliken II*); and *Hills v. Gautreaux*, 425 U.S. 284, the Court approved a variety of judicial remedies because they were needed to cure conditions of segregation and would be effective. In *Wright*, the Court prevented a portion of a school district from withdrawing from the larger district because withdrawal would impede desegregation, would foster white flight, and would hurt the quality of education in the remaining portion of the district. 407 U.S. at 463-69. In *Milliken II*, the Court approved a plan requiring the State of Michigan to pay for educational programs until such time as "the remedial programs can help dissipate the continuing effects of past misconduct." 433 U.S. at 290. *Gautreaux*, though not a school case, applied the causation principle in upholding an order that HUD cure housing discrimination it had caused in Chicago by taking actions both inside and outside Chicago.[5]

[5] The same principle was followed in Milliken I;, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976); and *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977)(*Dayton I*), where the Court rejected remedies that were not designed to cure segregation caused by the party to whom they were addressed.

In two liability cases in the 1970's, the Court again reiterated and applied these concepts to determine if a school board had eliminated all of the segregative conditions it had caused. *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979)(*Dayton II*). The Court re-emphasized several now well established principles. The Court held that a school district that had segregated must eliminate all of the segregative conditions it had caused to avoid liability. *Columbus*, 443 U.S. at 461. The Court held that any remedy must be effective. *Dayton*, 443 U.S. at 538. Finally, the Court held that remedial measures were not limited to student assignment. *Columbus*, 443 U.S. at 460.

In its two most recent cases, the Court has continued to apply the principles established in *Brown*, *Green* and *Swann*. Thus, in both *Board of Education v. Dowell*, 498 U.S. 237 (1991); and *Freeman v. Pitts*, 112 S.Ct. 1430, the Court reiterated that those who violated the law must cure any condition that flows from that violation -- any "vestige" -- but no more. The Court emphasized that the remedy must be measured by its effectiveness in eliminating the vestiges. *Freeman*, 112 S.Ct. at 1446. In addition, in *Freeman*, both the Court and Justice Souter in concurrence emphasized that vestiges of segregation were not limited to those identified in *Green*, but could involve other factors such as the quality of education. 112 S.Ct. at 1446, 1454.

II. MISSOURI'S ARGUMENTS, IF ACCEPTED, WOULD REPRESENT A RADICAL REVERSAL OF EXISTING LAW

A. Compliance With A Desegregation Remedy Is Measured By Its Effectiveness In Eliminating The Vestige Of Segregation, Not The Effort To Do So

The district court found that segregation in Kansas City had caused a deficit in educational achievement. *Jenkins*, 593 F.Supp. at 1492. This finding was fully consistent with this Court's finding in *Brown I* that segregation caused deficits in educational achievement. 347 U.S. at 494.

The court then imposed a remedy designed to cure the deficit. *E.g.*, *Jenkins*, 639 F.Supp. at 31. Additional educational resources were ordered for the purpose of curing the educational deficits that the court had found to be vestiges of segregation. *Id.* That order was fully consistent with this Court's finding in *Milliken II* that once a court found educational deficits that were vestiges of segregation, the court could order increases in educational resources for the purpose of curing the deficits. 433 U.S. at 278 (quoting the district court that the goal is to increase the "achievement level").

The district court in this case further found that the remedy it ordered was succeeding in curing the educational deficit that it had found to be a vestige of segregation. Order, April 16, 1993, at 8. At the same time, it found that it was practical and feasible to do more to cure the deficit. *Id.* at 11. The order that the remedy continue was thus fully consistent with this Court's repeated rulings that a remedy must eliminate the vestiges of segregation to the "maximum extent practicable." *See, e.g.*, *Davis*, 402 U.S. at 37; *Swann*, 402 U.S. at 26.

Missouri argues that it has cured the entire deficit, or

eliminated all vestiges, because it has provided additional educational resources. In effect, Missouri is arguing that it need not remedy the deficit in educational achievement, it need only try and that, even if it is unsuccessful in remedying that portion of the deficit that is a vestige of segregation, it should be relieved of further efforts.

This notion, that a defendant has fulfilled its duty if it has implemented a remedy, regardless of whether that remedy has eliminated all of the vestiges of segregation, has been repeatedly rejected by this Court. A defendant will not have fulfilled its duty until its actions have been effective in curing the violation. *Green*, 391 U.S. at 439 ("The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan . . . ."); *Wright*, 407 U.S. at 460-62; *Dayton II*, 443 U.S. 526-28 ("continuing duty to eliminate the effects of the system"); *Davis*, 402 U.S. at 33, 35, 37 ("The measure of any desegregation plan is its effectiveness"); *Monroe*, 391 U.S. 450; *Raney*, 391 U.S. 443.

It is surely relevant that Missouri has complied with the orders requiring it to increase educational resources. *E.g.*, *Freeman*, 112 S.Ct. at 1449. For this Court to hold that it is sufficient, even if it has been ineffective in curing the vestiges of segregation to the extent practicable, would require the Court to abandon one of the most well-established doctrines of desegregation law. Thus, Missouri's claim is not only not compelled by existing law, it is foreclosed.

B. A Goal Of Improving Educational Achievement As A Means Of Curing Educational Deficits That Were Vestiges Of Segregation Is Proper

Missouri's more fundamental challenge to the structure of desegregation law is its contention that deficits in educa-

tional achievement cannot be vestiges of segregation and, therefore, the goal of the court-ordered remedy in this case is improper.

Missouri appears to support its challenge by making two arguments. First, Missouri argues that the *Green* factors are the only elements of a school system that can be considered vestiges of segregation. The most recent and most explicit rejection of this argument was by Justice Souter in his concurring opinion in *Freeman*. Justice Souter wrote that "*Green*'s specific list of factors, of course, need not be treated as exclusive." 112 S.Ct. at 1454, n.1. The Court's majority agreed, holding that it was appropriate to address the *Green* factors and "to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies" including "quality of education." *Freeman*, 112 S.Ct. at 1446. These holdings were consistent with the entire line of school desegregation cases, including *Green* itself. *Green*, 391 U.S. at 435; *Swann*, 402 U.S. at 18-19 (quality of education as a vestige of segregation); *Wright*, 407 U.S. at 464 (quality of education); *Milliken II*, 433 U.S. at 278, 280-81 (educational deficits).

Missouri's second argument is that, as a matter of law, 40 years after *Brown I*, it is no longer possible to attribute any deficits in educational achievement to past segregation. In *Brown I*, this Court held that deficits in educational achievement were caused by past segregation. 347 U.S. at 494. Missouri argues that any deficits today are not vestiges of past segregation and need not be remedied. Missouri is correct in its assertion that, if existing educational deficits cannot be attributed to past segregation, the district court was without authority to order that they be cured. *Freeman*, 112 S.Ct. at 1445. To the extent that any current condition, whether student assignment or deficits in educational

achievement, cannot be attributed to past segregation, whether as a result of the passage of time or of some other factor, the district court is without authority to order remedial action in that area. *Id.* at 1448.

However, the district court in this case found just 10 years ago that as a matter of fact the then-existing deficits in educational achievement were caused by past segregation. *Jenkins*, 593 F.Supp. at 1492. Missouri does not challenge that finding. Brief for Petitioners at 7, n.8. In the intervening years, the district court has repeated the finding and it has been affirmed by the court of appeals. *E.g.*, *Jenkins*, 639 F.Supp. at 25, *aff'd*, 807 F.2d at 682-86. Thus, Missouri cannot argue, and is not arguing, that as a matter of fact in this case current deficits in educational achievement were not caused by past segregation. Instead, Missouri is arguing that in the 10 years since the liability finding in this case, the world has changed to a point where no court, under any circumstances, regardless of the evidence, could find current deficits in educational achievement were caused by past segregation.

In school desegregation, this Court has repeatedly indicated that it must rely in large measure upon the district courts to identify the sometimes subtle effects of segregation. In *Keyes v. School District No. 1*, 413 U.S. 189 (1973), the Court emphasized the subtlety of effects of segregation: "[A] connection between past segregative acts and present segregation may be present even when not apparent and . . . close examination is required before concluding that the connection does not exist." *Id.* at 211. For this reason, and because the district courts are more attuned to local conditions, this Court has historically and properly relied on the district courts to assess the present impact of past segregation. *Brown II*, 349 U.S. 294; *Swann*, 402 U.S. at 28 ("[W]e must of necessity rely to a large extent . . . on the informed judgment of the district courts in the first instance

and on the courts of appeals"); *Milliken II*, 433 U.S. at 287, n.18; *Columbus*, 443 U.S. at 469 (Stewart, J., concurring in part and dissenting in part). Missouri's suggestion would reverse that longstanding principle.

In addition, there is no evidence in the record to support the remarkable assertion that current deficits in educational achievement cannot have been caused by past segregation. There is also no evidence in the record that would distinguish deficits in educational achievement from other vestiges of segregation for these purposes. Thus, if Missouri's argument were to be adopted by this Court, it would jeopardize all school desegregation remedies.[6] Missouri's argument is not only not compelled by existing law, it is foreclosed.

C. A Goal Of Improving Educational Achievement As A Means Of Attracting Non-Minority Students Is Proper

The remedy in this case is designed not just to improve those deficits in educational achievement that are vestiges of segregation, but also to attract non-minority students into the

[6] In *Freeman*, Justice Scalia suggested that the 40 years since *Brown I* might at some time in the near future be the basis for re-examination of some of the principles of causation, such as the presumptions of *Swann*, *Keyes* and *Dayton II* and the burden shifting principles of *Columbus* and *Dayton II*. Missouri is making a far more radical suggestion. Missouri is suggesting that even if the burden were shifted to plaintiffs to reprove causation and even without any presumptions, a plaintiff could not, as a matter of law, establish causation. *Amici* would vigorously oppose the restructuring of desegregation law proposed by Justice Scalia but, because Missouri has not suggested it here, the Court need not reach that question.

Kansas City public schools.[7] In *Wright*, this Court expressly endorsed a remedy designed in part to attract non-minority students from private schools into the public schools. 407 U.S. at 464. The educational enhancements ordered by this district court are designed in part to do exactly that and are thus well within the discretion of the district court. Missouri does not cite *Wright* and only briefly mentions this portion of the remedial goal of attracting non-minority students.

Missouri argues that the portion of the goal that seeks to attract non-minority students from surrounding suburbs is, by definition, interdistrict. Because in this case an interdistrict violation was not found, Missouri argues that the goal is improper. Missouri relies on *Milliken I* which did hold that intradistrict violations would not justify interdistrict remedies.

The key to Missouri's argument is its view that any remedy that has any effect on any person beyond the school district at issue is by definition an interdistrict remedy. The key flaw in this argument is that it misunderstands the concept of an "inter-district" remedy. In *Hills v. Gautreaux*, this Court expressly rejected Missouri's definition of an "interdistrict" remedy.

> The District Court's desegregation order in *Milliken* was held to be an impermissible remedy not because it envisioned relief against a wrongdoer extending beyond the city in which the violation occurred but because it contemplated a judicial decree restructuring the operation of local governmental entities that were not implicated in any constitutional viola-

[7] An additional purpose for the remedy in this case is to achieve intradistrict desegregation, a goal not challenged in Missouri's brief.

> tion . . . . Nothing in the *Milliken* decision suggests a *per se* rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred.

425 U.S. at 296-98.

One portion of the remedial order in this case, that requiring Missouri to foster voluntary transfers of minority students to the suburbs, is directly analogous to *Gautreaux*, but that portion is not before this Court at this time. What is before the Court is the portion that requires Missouri and KCMSD to improve education in Kansas City to attract non-minority students. The suburban districts are not being restructured or indeed required to take any steps. Missouri is not even being required to take any steps "beyond the municipal boundaries" of Kansas City. Only wrongdoers are being required to act in this case and the only actions they are required to take are within the boundaries of Kansas City. This remedial order is simply not interdistrict within the meaning of *Milliken I* and *Gautreaux*. Missouri's argument to the contrary is not only not compelled by existing law, it is foreclosed.

D. The Remedy In This Case Is Not, As A Matter Of Law, Overbroad

This Court has held that the remedy in a school desegregation case must be tailored to the violations. *Dayton I*, 433 U.S. at 418. The district court in this case has acknowledged that requirement. It considered and rejected as impractical alternative remedies such as mandatory student reassignment. *Jenkins*, 639 F.Supp. at 38. It considered each and every program that was suggested to cure deficits in educational achievement, accepting those it found tailored

to that requirement and rejecting those it found not to be. *E.g.*, Order, April 16, 1993. The district court and the court of appeals have repeatedly found the challenged remedy in this case necessary and practical. *E.g.*, *id.* They have found other remedies unnecessary or impractical. 639 F.Supp. at 38, *aff'd*, 807 F.2d 657. Finally, they have found the remedy in this case is working. Order, April 16, 1993; 11 F.3rd at 765.

Nevertheless, Missouri asks this Court to rule that the remedy here is overbroad as a matter of law, even accepting the legitimacy of the goals that remedy is designed to achieve -- namely, improving deficits in educational achievement and attracting non-minority students. Missouri proffers three reasons in support of its overbreadth argument, none of which have merit.

First, Missouri argues that its expenditures have been so great that there must come a point when they are enough. If Missouri is suggesting that cost alone can be the basis for refusing a remedy, that suggestion is contradicted by *Swann* and other cases. If Missouri is suggesting that at some point the cost of a remedy becomes great enough, then the remedy can be abolished even though it has not yet been fully effective, that suggestion is contradicted by a long line of this Court's cases. *See* Section I above. If Missouri is suggesting that there are less expensive ways of achieving the goals sought by the court, that suggestion is particularly factual and should be addressed to the courts below. If there were less expensive, but still practical ways of achieving the goals in Kansas City and eliminating all vestiges of segregation, *amici* believe the district court would have an obligation to adopt those methods. However, Missouri does not suggest to this Court any less expensive ways of achieving the goals and, in the absence of any evidence on that question, it would be improper for this Court to hold that the district

court and the court of appeals were wrong as a matter of law.

Second, Missouri suggests that the remedy is overbroad because it affects non-minority children within the district who were not victims of discrimination. In at least two places, Missouri cries out that it "defies logic" to believe that segregation affected the achievement of non-minority students and thus a remedy affecting their achievement is overbroad. Brief for Petitioners at 22, 41. Given the district court's conclusion, unchallenged by Missouri, that segregation caused the KCMSD to provide inferior education to all of its children, it is hardly illogical to remedy that deficit for all of its children. More importantly, the remedy in this case is not based on a causal link between current deficits in educational achievement by white children and past segregation. The remedy is designed to improve the entire district so as to remedy the deficits of those children who were affected and to attract non-minority children. Assuming those goals are proper, as for this portion of the argument Missouri does, given the heavy minority enrollment in the district, and given the constitutional command that minority children not be segregated by race from non-minority children, it is difficult to imagine a remedy that would improve educational achievement for minority children only. This logic does not escape Missouri. Thus, for example, Missouri supported the expenditures necessary for Kansas City to receive an AAA rating even though the improvements made possible by those expenditures would affect non-minority children. Missouri offers no explanation for its argument that the current expenditures are somehow improper for affecting white children when the prior expenditures were required though they affected white children.

Finally, Missouri complains that the court of appeals has defined the standard of educational achievement that must be met before all vestiges are eliminated as achievement of national norms on standardized tests. This standard is improper, Missouri argues, not only because it goes beyond the violation (an argument addressed above), but also because it is unattainable. Test scores are affected by too many other factors, Missouri argues.

The court of appeals did not hold that attaining national norms on standardized tests will be the sole measure that will be used to determine whether all vestiges of the deficits in educational achievement have been eliminated. *Jenkins*, 19 F.3d at 395. The court held, unremarkably, that tests are one measure that the district court should use in determining the effectiveness of the remedy in eliminating the vestiges of segregation in Kansas City. *See* Section IIA above.

The Eighth Circuit judges who dissented from the denial of *en banc* review argued in part that, despite the rhetoric, no other measures of effectiveness were identified by the court of appeals and that therefore test scores would be the only measure. *Jenkins*, 19 F.3d at 396. Missouri repeats that argument here. In fact, the district court has discussed other measures it will use to determine if the tests defined in *Dowell* and *Freeman* have been met and all vestiges of segregation eliminated, including the racial composition of the schools. *Jenkins*, Order, April 16, 1993, at 8. Thus, no court has made test scores the sole factor.

More fundamentally, the Eighth Circuit dissenters and Missouri are seeking more rigid measures that can be used to determine when a vestige has been eliminated. This Court has resisted previous attempts to set rigid rules. Thus, in *Swann*, 402 U.S. at 24, the Court correctly rejected the idea that every school must precisely reflect the racial composition of every other school and that any school deviating from that principle was *per se* unconstitutional. More recently, in *Dowell* and *Freeman*, the Court rejected the idea that additional precision could be given to the concept of

unitariness (the idea that all vestiges of segregation have been eliminated). *Dowell*, 498 U.S. at 245-46. A large part of the rationale for the doctrine that in school desegregation cases the Court will rely heavily on the district courts is that no one desegregation plan and no one desegregation measure will apply to the many different circumstances presented by the thousands of school districts in this country. *E.g.*, *Green*, 391 U.S. at 439; *Wright*, 407 U.S. at 466. For this Court to attempt a precise measure of educational quality, applicable to all school districts, would place this Court much deeper into the "controversies over educational philosophy" than the remedy in this case. *See Missouri v. Jenkins*, 495 U.S. 33, 76 (1990)(Kennedy, J., concurring).

District courts and school districts are not without any guidance. The long-established principle set by this Court is that vestiges of segregation will be said to have been eliminated when the "condition that offends the Constitution" is corrected. *E.g.*, *Swann*, 402 U.S. at 16. If the court of appeals had held that KCMSD must meet national norms on standardized tests regardless of whether the difference between current scores and national norms was caused by segregation and regardless of its relationship to the need to improve educational quality to attract non-minority children, it would have erred.[8] The key is causation. *Freeman*, 112 S.Ct. 1430. The district court has wide discretion in issuing orders that correct conditions that it finds were caused by segregation. It may not correct conditions that were not. *Id.* Given the wide variation in school districts around the country, no further precision is needed or possible.

Missouri also appears to suggest that given the many

[8] Similarly, it would have erred if it had held that KCMSD must achieve "suburban comparability" regardless of the relevance of that standard to curing conditions caused by segregation. The lower courts did not so hold.

factors that influence the test scores of students, and given the wide variety of educational theories concerning methods to improve educational achievement,[9] improvement in test scores may be unattainable. The district court did not order improvements in education in KCMSD because the students there had a constitutional right to any minimum education.[10] It issued the orders to correct conditions it found to have been caused by segregation. The district court left the choice of a method of improving education to the community involved, *Jenkins*, 593 F.Supp. at 1506, and the method is fully supported by that community.[11] In addition, the district court has held that test scores are improving as a result of this remedy and that further progress could be made. Order, April 16, 1993, at 11. Thus, Missouri is asking this Court to hold, as a matter of law, that no remedial method will result in improvement in student test scores. For the most obvious reasons, such a ruling is neither warranted nor wise.

[9] See *Missouri v. Jenkins*, 495 U.S. at 76 (Kennedy, J., concurring)("A remedy that uses the quality of education as a lure to attract non-minority students will place the District Court at the center of controversies over educational philosophy that by tradition are left to this Nation's communities").

[10] *Missouri v. Jenkins*, 495 U.S. at 76 (Kennedy, J., concurring).

[11] The objections to the remedy come not from the local community but from the state, and those objections are based solely on cost, not on educational philosophy. *See Milliken II*, 433 U.S. at 295-96 (Powell, J., concurring).

CONCLUSION

The remedy in this case is undeniably expensive and extensive. It is tempting to suggest that there were surely other remedies, less expensive and less extensive that, in time, also would eliminate conditions of segregation in Kansas City. Strikingly, Missouri has not suggested an alternative in the district court and does not suggest an alterative here; it only asks that this remedy be abolished. For this Court to do that, it must repudiate the factual findings of the district court, affirmed by the court of appeals. It must repudiate much of the legal structure it has created since *Brown* to guide the lower courts in these cases. Were the Court to do so, it would send a powerful signal to this nation. This Court would be signaling that its determination to eliminate all of the evils of purposeful race discrimination in this country has ended. That the Court must not do. The decision below should therefore be affirmed.

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Supreme Court of the United States

October Term, 1994

State of Missouri, *et al.*,

Petitioners,

v.

Kalima Jenkins, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF AMICUS CURIAE THE CIVIC COUNCIL OF GREATER KANSAS CITY IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

The Civic Council of Greater Kansas City (hereafter referred to as the "Civic Council") is an individual membership organization generally comprised of the chief executive officers of 70 of the largest companies and professional firms in the bi-state (Missouri and Kansas) metropolitan area comprising Greater Kansas City. These companies and firms currently employ thousands of people across the metropolitan area. The Civic Council was founded over 30 years ago for the purpose of bringing together the chief executive officers of these major employers to allow them to consolidate their resources to solve community problems. The Civic Council is governed by a 20-member Board of Directors which sets overall policy direction. The Civic Council has an Education Policy Committee that advises the Board of Directors on education issues. Education has long been a high priority for the Civic Council. The Civic Council and its members have a long history of involvement in supporting the Kansas City, Missouri School District (hereafter referred to as "KCMSD") and the desegregation case which is the subject of this appeal. The Civic Council has been a constructive critic and has invested human and financial resources in assisting the KCMSD in building management systems to support the educational process.

No party to this litigation shares the Civic Council's particular perspective, and thus the input of the Civic

Council as provided by this amicus curiae brief should be of benefit to the Court.[1]

ARGUMENT

I. THE COST OF THE REMEDY THAT THE COURTS BELOW HAVE APPROVED IS NOT EXCESSIVE OR UNFAIR TO THE STATE AND THE REMEDY HAS NOT YET ACCOMPLISHED THE GOAL OF PROVIDING KANSAS CITY STUDENTS WITH A HIGH-QUALITY, DESEGREGATED EDUCATION. THEREFORE, THE JUDGMENTS OF THE COURTS BELOW SHOULD BE AFFIRMED.

The Civic Council can provide this Court with the appropriate local perspective regarding what the costs of the remedy are; why the damage caused by the State's conduct justifies the portion of the cost that the State has been ordered to pay; and why this Court must not terminate any part of the remedial effort that the courts below have ordered since Kansas City does not yet have the high-quality, desegregated school system that it would have had but for the State-mandated discrimination and racial segregation of schools.

[1] All parties to this proceeding have consented to the Civic Council's participation pursuant to Sup.Ct.R. 37.3. The original written consents have been lodged with the Clerk of the Court.

A. The State's Repeated Invocation of the "$1.3 Billion" Cost of the Remedy Fails to Take Into Account the History of the Funding Issues in This Case and the Depth of the Effort that Will be Required To Desegregate Fully the Kansas City Schools.

The State creates the impression that it is a victim of alleged extravagances of the plaintiffs, teachers union, school district and courts below. Its emphasis on dollar figures does not take into proper account all aspects of the cost of the remedy and how it is being funded. A proper presentation demonstrates that the burden on the State is not as dramatic as it appears and is fair in proportion to its history of discrimination in the Kansas City, Missouri schools. Since the Civic Council for several years has placed its highest priority on education and has a long history of involvement in supporting the KCMSD as well as being a constructive critic, it is in a unique position to explain the actual costs involved in the remedy ordered by the courts below.

1. *Local Contribution.* It has long been clear to the Civic Council that the KCMSD would continue to lose white and middle-class families and fail to provide the area with capable, employable graduates for area businesses and industries, unless the district had a competitive tax rate to fund educational programs that meet the skill and knowledge requirements of students whether they go to work after high school or continue their training and education. In 1990, this Court considered the State's strong objection to the federal courts setting aside state law that barred local tax increases so that the

KCMSD's taxpayers would make a meaningful contribution to the Kansas City remedy. This Court ruled that the courts below, at the initiative of the local taxing authority (in this case the duly elected school board), had the authority to set aside state laws that capped the property tax at levels so low that no significant local contribution could be generated. *Missouri v. Jenkins*, 495 U.S. 33 (1990). The alternative was for the State to pay the entire cost of the remedy through principles of joint and several liability. *Jenkins v. Missouri*, 855 F.2d 1295, 1310-11 (8th Cir. 1988), *aff'd in part, rev'd in part*, 495 U.S. 33 (1990).

The Civic Council strongly supported the tax increase at issue in that case. The ordered increase brought the property tax levy from $2.05 per $100 of assessed valuation to $4.00 at that time. *Jenkins*, 855 F.2d at 1301. The Civic Council, which includes several of the KCMSD's major property taxpayers, supported such a significant tax increase because it recognized the importance of the local community taking ownership and responsibility for improving the quality of Kansas City schools. Such an increase could make successful desegregation a possibility and help pay for the specialized programs that would attract students to schools outside of their segregated neighborhoods.

The Civic Council also recognized that the property tax levy rate in Kansas City was "much less than the tax levy of any neighboring school district," *Jenkins v. Missouri*, 672 F.Supp. 400, 413 (W.D. Mo. 1987), because State law required super-majority votes of the people to raise the levy, and the voters had stopped their support at the super-majority level once the KCMSD's enrollment became majority black in 1969. *Jenkins*, 855 F.2d at 1312.

The Civic Council also supported a later increase of the property tax levy rate to $4.96, with the $.96 increase earmarked for the purpose of helping to maintain the KCMSD's salaries at levels as near market rates as necessary to implement the desegregation plan. David Stanley, the Chairman and Chief Executive Officer of Payless Cashways, a current member of the Civic Council Board of Directors and a former chairman of the Civic Council and its Education Committee, testified before the school board at a public hearing in support of the $.96 tax increase. The salaries of teachers, education professionals, and other KCMSD staff and administrators were vastly below competitive levels and clearly inadequate to staff the specialized magnet programs that were in place. The Civic Council recognized that the remedy as a whole would not succeed without this relief and was supportive of local efforts to fund the KCMSD's share.

The result of this local effort is that the KCMSD has tens of millions of dollars each year to contribute to its presumptive share of the remedy imposed by the courts below. The local taxpayers have paid hundreds of millions of dollars toward the costs of the remedy programs, including those at issue here. Moreover, the KCMSD consistently has actually paid its full presumptive share, one-half in almost all cases, of capital improvement costs.

Local taxpayers provided this financial support despite the State, not because of it. The State severely restricts the ability of local school districts to raise local funds. *Jenkins*, 672 F.Supp. at 411. The State had the ability at any time to take legislative action to desegregate the KCMSD and to give school districts undergoing

desegregation greater flexibility to raise local revenue, but it has chosen not to do so.[2]

Unlike the State, the KCMSD has issued bonds to defray the cost of capital improvements rather than attempting to pay all capital expenses out of current revenue. KCMSD property taxpayers, including Civic Council members, have paid 100 percent of the cost of the debt service on the KCMSD's share of the capital program. The State's complaint that the costs of desegregation in Kansas City restrict the State's ability to support other services is primarily the result of the fact that the State refuses to use its legal power to issue such bonds to pay its share of these long-term capital costs.

2. *Costs Not at Issue Here.* The State's focus on the overall cost of the remedy also obscures the fact that substantial portions of the remedy are not before the Court at all in the orders under review. The costs of all the capital improvements (many of which are not yet complete), ordered by the courts below in the amount of approximately $544 million, and the magnet program costs, including transportation, almost $330 million to

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[2] The Civic Council lobbied the Missouri General Assembly for adoption of Senate Bill 380, The Outstanding Schools Act, and supported increased corporate income taxes and increased taxes on higher earning individuals to support improved education funding on a statewide basis. At the same time, the Civic Council is sensitive to, and has lobbied against, any imposition of "punitive" taxes by the General Assembly only on residents of the KCMSD. Such taxes would make it even more difficult to attract and retain businesses within the district because of the inequities that would be created by such punitive taxes versus those across the metropolitan area.

date according to the State's own figures, are not within the scope of the questions presented by the State in its Petition for a Writ of Certiorari.

The capital improvement costs warrant further discussion, however, because the atrocious condition of schools in Kansas City at the time of the remedy hearings in 1985 was the visible manifestation of the State's financial abandonment of schools in this district as its students became majority black. As the trial court below explained, the Kansas City "physical facilities have literally rotted" as the result of the KCMSD's "inability to raise additional funds under the [State finance] system" after the KCMSD's student population became majority black in 1969. *Jenkins*, 672 F.Supp. at 411.

The Civic Council is an active supporter of the economic development of the Kansas City area. These schools were an embarrassment and blight on the prospect of recruiting talented management and staff to our businesses. It was impossible to explain how a community could allow its children to spend hours each day in buildings with reeking bathrooms, leaking roofs, and temperature controls so bad that classrooms were freezing or broiling, and then pretend that they could learn there.

The capital costs of closing and replacing the worst of these buildings, and renovating those that could be modified, to be safe and healthy and accommodate modern educational programs were and remain essential to the success of the remedy. Schools in Kansas City that have been built or renovated under the plan are schools of which we are now proud but more importantly which

communicate to children that they and their education have value and are a priority in our community. The fact that this cost must now be paid in a short period of years is the price the State should pay because of its segregation and concomitant economic starvation of these schools over the course of decades. These are, however, one-time capital costs. From a business standpoint, it is inappropriate to lump them in with ongoing program costs, as the State does, to create the picture of a huge, endless financial burden.

3. *Overall Foundation Formula Support of the Kansas City District*. The State takes pains to point out that its financial support of the KCMSD out of regular, non-desegregation revenues is at a level beyond the average per capita level elsewhere in the State. Brief of Petitioners at 26 n. 16. While this, too, is not before the Court, the picture it presents is so distorted that it requires correction. The KCMSD was one of the successful parties in a recent state court school finance litigation, *Committee for Educational Equality v. Missouri*, No. CV190-1371CC (Cir. Ct. Cole Cty.), that challenged the adequacy and equity of the system of school finance in Missouri under the provisions of the Missouri Constitution. The trial court in that case directed the Missouri General Assembly to devise a remedy that cures the inequities in the system.

The Civic Council played a key role in the passage of the legislation that resulted, The Outstanding Schools Act, Senate Bill 380 (R.S.Mo. 1993). The Act provides a significant overall increase in funding for education in Missouri and better recognition of the extra costs of educating at-risk children. This new system began phasing into effect in the current fiscal year. The figures that the

State cites in note 26 of its brief reflect the very recent funding increases that resulted from that effort. It rings hollow for the State now to tout a level of funding that Kansas City and other school districts have just begun to receive, had to go to court to get, and had to fight hard in the General Assembly to achieve.

4. *The Extent of the Harm and Depth of the Need*. The most fundamental flaw in the State's emphasis on dollar figures is that it glosses over the vast harm the State did to the schoolchildren in Kansas City by its segregation mandates. The State would have the Court believe that the harm of *de jure* segregation was to "deprive[ ] minority and non-minority students of the cultural richness of a diverse educational environment. . . . " Brief of Petitioners at 22. This absurd understatement insults the people of this community. Missouri was a slave state. Teaching an African-American child to read was forbidden by law until after the Civil War. It was a crime thereafter to educate white and black children in school together, and our Missouri Constitution did not eliminate that prohibition until 1976.

When *Brown v. Board of Education*, 347 U.S. 483 (1954), was issued, the State stood back and left implementation to local districts, with the result that segregated conditions did not change. White enrollment in Kansas City plunged from 1954 to 1977 when this case was filed, and local voters were unwilling to raise financial support for the KCMSD once the KCMSD's enrollment became majority black in 1969. The State could have stepped in at any time and accomplished effective desegregation. That would have been far easier in 1960 when the student population was 73 percent white, or in 1970, when the

student population was just under 50 percent white, than in 1983-84 (the year in which liability was found) when it was only 27 percent white.

While the school buildings "rotted" as a result of segregation, that was just the external condition that the eye could see. The quality of education was equally terrible, expectations for students were low, and the KCMSD was the only school district on the Missouri side of the metropolitan area that did not have the State's AAA rating. The lack of that rating was an emblem to families moving to the area – and to white and middle-class families in the KCMSD with choices – that their children would be relegated to second-class status if they attended school in the KCMSD. We recognize in our activities in support of education that vast socio-economic disparities were created in Kansas City through the long history of segregation and the resulting deterioration of education in the KCMSD.

The Civic Council does not ask the Court to disregard the cost of the remedy. It is very substantial. Costs only can be evaluated as appropriate or excessive, however, when measured against the needs involved and the value of the benefit to be gained. Against both of those measures, the cost of this remedy is a vital and necessary investment in the future of the Kansas City metropolitan area. The State failed to make that investment at the appropriate time, and barred the community from making it, for decades. Any sudden ending of any part of this effort would throw the system into chaos and reawaken the public skepticism that Kansas City public schools can

ever deliver quality education. We urge the Court to stay the course, as we have[3] and the courts below have, until the history of racial discrimination in the schools and the vestiges it has left in our community are erased.

B. Restoration of High Quality Education in Kansas City, as the Remedy Has Begun To Do, Is Essential to Successful Desegregation, and the Courts Should Not Be Satisfied Until Performance Is Improved.

Thousands of white and middle-class families took their children out of the KCMSD's schools and moved out of the KCMSD in the 1950's, 1960's, and early 1970's. Parents will go where they perceive they will get a better educational opportunity for their children, including other opportunities inside the corporate boundaries of Kansas City. This is a metropolitan area with many attractive and successful school districts available for parents who are attentive to the needs of their children. On the Kansas side of the state line as well as the Missouri side, award-winning school districts have excellent programs. Through the State-mandated pattern of allowing local districts to avoid educating black children, the KCMSD became identified as the "black" school district. The

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[3] The Civic Council has invested human and financial resources in assisting the KCMSD in building management systems to support the educational process. Most recently, a member of the Civic Council donated services to assist the KCMSD in building a computerized system for forecasting revenues and expenditures. Other members have assisted in developing management information, accounting, and financial management systems.

State's underfunding of education in the KCMSD reduced quality to a level that matched the public's stereotypes of what education in a "black district" would be. The KCMSD accordingly had a monumental task at the outset of this remedy to regain the confidence of the public and re-enroll non-minority students.

The Civic Council submits that the courts below have addressed this issue with sensitivity toward the metropolitan context of Kansas City and are pursuing the proper approach. Graduates of the KCMSD are predominantly minority. They will have to compete for positions in our companies with graduates of suburban and private schools, most of which are predominantly white. We know what the jobs of the future will be here in the Kansas City area.

The magnet programs and the underlying quality education programs that are part of the desegregation remedy will result in increased opportunities in life beyond graduation for these young people because they are tailored to the job market of the future. When the State chides the aqua culture facility, the technology programs including laser technology, optics and robotics, and the agricultural school, Brief of Petitioners at 10-11, it demonstrates its ignorance of something that we in the business community understand: these are the job opportunities of the future in the Kansas City area, as identified by our economic development agencies. As the desegregation remedial programs in Kansas City find their full student populations in the upcoming years – new non-minority students as well as the minority students for whom this remedy was designed – those children will

stand a far better chance to be prepared for the jobs of the future than Kansas City graduates have been for decades.

It is the cost of the alternatives that is far too high. Educational opportunities provided through the programs in this remedy give the minority children in our community the chance to be with students of all races and backgrounds and provide the baseline quality education they need for making them productive citizens and wage earners. The costs of public assistance, the criminal justice and prison systems, and the reeducating and retraining of employees that will be needed if a decent education is not provided are what neither the Kansas City community nor the State can afford. We who are very substantial local property taxpayers, as well as State taxpayers, support investment on the opportunity end of these students' lives rather than on the punishment and rehabilitation end.

This is not to say that we look to the courts to solve all of our local problems for us. We have supported legislation to build the ability of the KCMSD to support an appropriate educational program, and we will continue to strive to find means outside of the desegregation litigation to make high-quality, equitable educational opportunities available to area students. We have just committed to two additional years of funding a bi-state partnership initiated by the Civic Council, including the KCMSD and over 20 other area school districts, to assist schools and to encourage school districts to meet higher

expectations for student performance and to relate schools more closely to the workplace.[4]

We know that actual performance by students, just as performance by employees, is the appropriate measure of success, and we urge the Court to reach the same conclusion with regard to determining whether the educational vestiges of segregation have been eliminated to the extent practicable. We do not measure success in a business enterprise solely by how much money we put into it or whether it has the same resources as a competitor. The Court should reject the State's arguments that the unitariness of the quality of education in the KCMSD should be measured by the dollars put in or whether the resources are comparable to other districts. The real test of whether the quality of education is unitary should take full account of performance, by a variety of measures.

It is ironic that the State takes the position in this Court that these programs should not be assessed in terms of actual student performance. The Missouri Department of Elementary and Secondary Education and the Missouri General Assembly have been very vocal in other contexts in support of using student performances as the key measure of educational success. The Excellence in Education Act, adopted by the General Assembly several years ago, began the implementation of a process to evaluate schools based on performance rather than solely

[4] The initiative is called BE² (B-E-Squared), or Business/Education Expectations, which involves the participating school districts in a process intended to restructure systems of educational delivery and prepare area students for the demands and opportunities of the Kansas City job market.

on dollars spent. The Outstanding Schools Act, which substantially reformed education in Missouri and provided additional funding, goes a step further and holds school districts accountable for higher student performance. Those accountability measures were a condition of our support of the higher corporate and individual taxes imposed by the legislation.

We recognize that it will take time for this remedy to succeed. Not all building renovations are complete and thousands of African-American students are still in racially isolated schools. It is not sensible to expect quality education programs that substantially changed the way education is delivered in the district to reach their potential in terms of student performance in just a few years. Changes still are underway and thousands of students in the system have not had the full benefit of these remedies for long enough to compensate for the harm they suffered in their early years in segregated Kansas City schools. The Civic Council is confident that the courts below, which have heard many hundreds of hours of testimony and reviewed reams of data on the Kansas City schools, will be in the best position to judge when the vestiges of segregation affecting the quality of education in Kansas City schools are removed to the extent practicable.

CONCLUSION

For the foregoing reasons, the judgments of the courts below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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IN THE

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") was established in 1963 at the request of President Kennedy to involve private lawyers in a national effort to assure civil rights to all Americans. The Lawyers' Committee

has enlisted the services of thousands of members of the private bar in cases involving discrimination in voting, education, employment, housing, and municipal services.

The Lawyers' Committee has a long history of participation in school desegregation cases before this Court,[1] and in the lower courts, including cases obtaining relief for educational inequalities. Amicus submits that its experience in school desegregation litigation enables it to provide a perspective different from the parties and other amici on the issues before this Court.[2]

STATEMENT OF THE CASE

The State of Missouri has raised a variety of issues in its petition for certiorari and in its opening brief. Indeed, it is unclear from the various papers filed by the State precisely what questions it seeks to raise. Nevertheless, amicus suggests that this case should be decided according to the standards for unitary status discussed in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), in the context of educational remedies designed to create a unitary school system and to make whole the victims of segregation.

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[1] *See, e.g.*, amicus briefs in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991); *Missouri v. Jenkins*, 495 U.S. 33 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Grove City College v. Bell*, 465 U.S. 555 (1984); *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983); *Crawford v. Board of Educ.*, 458 U.S. 527 (1982); *Board of Educ. v. Harris*, 444 U.S. 130 (1979); *Bradley v. School Board*, 416 U.S. 696 (1974); *Alexander v. Holmes County Board of Educ.*, 396 U.S. 19 (1969); *NAACP v. Button*, 371 U.S. 415 (1963).

[2] Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately with this brief.

This case highlights the importance of the process for determining partial unitary status.[3] The State in this case did not file a motion for partial unitary status. Instead, the State raised the issue in an opposition brief to the school district's motion to continue funding of the educational improvement programs at an unchanged level for the 1992–93 school year.

During the evidentiary hearing on the motion for continued funding, the parties were permitted to present live witnesses and other evidence. The State presented testimony from only one witness, Dr. Terry Stewart of the Missouri Department of Elementary and Secondary Education. Dr. Stewart offered only limited testimony on some of the four *Freeman* unitary status requirements. *See* J.A. 439-483 (State's entire affirmative case on the *Freeman* requirements).[4] Dr. Stewart asserted that both defendants had complied with the court orders concerning each educational program, that the level of educational resources provided by some of the programs was higher in the Kansas City District than in surrounding school districts, and that quality of educational opportunities had "improved" in the Kansas City District. *Id.* Dr. Stewart had nothing to say about whether the programmatic remedies had eliminated to the extent practicable the vestiges of segregation in the areas of educational quality. J.A. 483. The State also offered no evidence of its good faith commitment to the goals of the remedial decree. *Id.*; P.A. 19.

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[3] The procedural posture of the case is more fully detailed in the Brief of Respondents Kansas City, Missouri School District and American Federation of Teachers Local 691.

[4] The Petition for Certiorari is cited in this brief as Pet. Cert., the Appendix to the Petition for Certiorari as P.A., the Reply in support of the Petition as Pet. Reply Br., the Joint Appendix as J.A., and Petitioner's Brief on the merits as Pet. Br.

Plaintiffs and the District presented witnesses and evidence refuting the State's claims. Those witnesses testified that racial isolation was decreasing, that additional progress in remedying the vestiges of segregation was necessary and practicable, and that the educational programs were integrally related to each other and to the overall remedy. J.A. 417, 422, 423-425.

The district court concluded that the State had failed to meet its burden under *Freeman* to demonstrate that partial unitary status of the educational programs component of the remedy had been achieved. J.A. 482; P.A. 70-72. On appeal, the Eighth Circuit reviewed the application of the factors discussed in *Freeman*, and affirmed the conclusion that the State had not met its burden of establishing partial unitary status. P.A. 19. Specifically, the Eighth Circuit ruled that the "evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable," and that the State failed even to address whether judicial control over the educational improvement programs was necessary or practicable to achieve compliance with the other remedial components, and whether the State had demonstrated a good faith commitment to the whole of the court's decree. *Id.*

The State does not challenge the manner in which the district court or court of appeals balanced the limited evidence offered. Instead, the State attempts to characterize the decision below as standing for a legal proposition which, as the State concedes, was not adopted by the district court and, according to the State, "first surfaced" in the Eighth Circuit's panel opinion: that unitary status was denied because student test scores had not achieved some unspecified level. Pet. Br. at 48 n.32.

In response to the State's petition for rehearing *en banc*, the Eighth Circuit explicitly stated that it was *not* adopting a standard

for unitary status that requires a specified level of student achievement or specific scores on standardized tests. In denying rehearing *en banc*, the author of the panel opinion, Judge John R. Gibson, wrote:

> [t]est scores ... must be *only one factor* in the equation. Nothing in this Court's opinion, the district court's opinion, or the testimony of KCMSD's witnesses indicates that test results were the only criteria used in denying the State's claim that its obligation for the quality education programs should be ended by a declaration that they are unitary.

Denial of Rehearing *En Banc* (P.A. 48-49) (emphasis added). Likewise, neither the District nor the *Jenkins* plaintiffs have ever advocated an exclusive or specific test scores standard.

SUMMARY OF ARGUMENT

Since *Brown v. Board of Education*, this Court has consistently held that school authorities found to have intentionally segregated students have an obligation to eliminate all vestiges of segregation. This obligation requires more than the disestablishment of *de jure* segregation; it also requires the elimination of all aspects of inequality of educational opportunity and educational harm suffered by African American and other minority students. The State challenges the lower courts' consideration of educational quality, failing to appreciate that educational harm to minority students is a key vestige of prior segregation that must be remedied.

The State's arguments would also do violence to the established standards and process for making a unitary status determination. This Court's desegregation cases establish clear standards, guided by traditional principles of equitable discretion,

for determining whether the purposes of a desegregation decree have been accomplished. Most recently, this Court in *Freeman* and *Dowell* articulated a process for district courts to follow when deciding whether a desegregation decree should be partially or completely dissolved. In this case, the State failed to satisfy the standards or follow the process this Court has established for the determination of partial unitary status.

The Court should reject the State's argument that evidence of educational outcomes is irrelevant to a unitary status determination. A district court must undertake a searching inquiry into all facets of a school district's operations before deciding to partially or completely dissolve a desegregation decree. District courts should not be precluded from considering evidence that is clearly relevant, and that can be central to determining whether the remedy has been completely effective in eliminating the vestiges of segregation.

ARGUMENT

I. THIS COURT HAS CONSISTENTLY HELD THAT ALL VESTIGES OF SEGREGATION, INCLUDING EDUCATIONAL HARM AND INEQUALITY, MUST BE ELIMINATED FROM FORMER *DE JURE* SEGREGATED SCHOOL SYSTEMS.

This Court consistently and forcefully has held that the obligation of school authorities in formerly *de jure* segregated systems is to remove all vestiges of segregation to the extent practicable. *Freeman v. Pitts*, 112 S. Ct. 1430, 1443 (1992); *Board of Educ. of Oklahoma City v. Dowell*, 498 U.S. 237, 250 (1991); *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1, 15 (1971); *Green v. County School Board*, 391 U.S. 430, 437-38 (1968). Indeed, the depth of this obligation has been

described as an affirmative duty to eliminate segregation and its effects "root and branch." *Freeman*, 112 S. Ct. at 1443 (*quoting Green*, 391 U.S. at 437-38).

The constitutional command to disestablish dual school sytems and its effects, therefore, has always required not only the desegregation of all aspects of a school system, but elimination of the essential conditions associated with segregated and unequal schooling — the inequality of educational opportunities and the educational harm suffered by African American and other minority children. *Brown v. Board of Education*, 347 U.S. 483, 493-94 (1954) (*Brown I*); *Green*, 391 U.S. at 437-38; *Milliken v. Bradley*, 433 U.S. 257, 289-90 (1976) (*Milliken II*); *Freeman*, 112 S. Ct. at 1443.

Even prior to *Brown I*, this Court recognized and required relief to address not only the obvious, but the intangible inequalities and harms occasioned by segregated and discriminatory schooling in higher education, both through separate segregated schools, *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950), and through racial isolation and disparate conditions and opportunities within a purportedly desegregated school, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 640-41 (1950).

In *Brown I*, the Court decided that, in the context of "separate but equal" schooling, minority children in segregated public schools were deprived of "equal educational opportunities." 347 U.S. at 493. The Court held that intentional segregation causes a variety of harms, including stigmatic injury and lowered educational achievement, which must be addressed by desegregation remedies. The Court found that the stigma imposed on minority students by state-imposed segregation "generates a feeling of inferiority as to their status in the

community that may affect their hearts and minds in a way unlikely ever to be undone," and reasoned that "this feeling of inferiority" had "'a tendency to [retard] the educational and mental development of Negro children.'" *Id.* at 493-94 (*quoting McLaurin*, 339 U.S. at 641).

Accordingly, in *Green*, this Court required a searching inquiry as to all facets of a school system in fashioning and assessing remedies, to ensure the elimination of segregation and inequalities in facilities, resources, faculties, and other factors affecting the opportunity of minority children to learn and participate in the school programs. These inquiries apply not only to the features of the original dual system, but to other ways in which segregation and inequality may have been perpetuated in schools and school systems. *See United States v. Fordice,* 112 S.Ct. 2727, 2735 (1992); *Columbus Board of Education v. Penick*, 443 U.S. 449, 458-59 (1979); *Dayton Board of Education v. Brinkman* (*Dayton II*), 443 U.S. 526, 538-39 (1979).

These fundamental remedial objectives were explicitly reaffirmed in this Court's recent school desegregation rulings. The duty and responsibility of a

> school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system. This is required in order to insure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present.

Freeman, 112 S. Ct. at 1443.

In *Freeman*, this Court expressly approved inquiries by the courts "to determine whether minority students were being disadvantaged in ways that required the formulation of new and

further remedies to insure full compliance with the court's decree," 112 S. Ct. at 1446. The Court also endorsed efforts by which "a district court can concentrate both its own resources and those of the school district on the areas where the effects of *de jure* discrimination have not been eliminated and further action is necessary in order to provide real and tangible relief to minority students," even while withdrawing supervision in other areas. 112 S. Ct. at 1447.

The focus of these efforts is to bring about the establishment of school systems in which the characteristics of segregation and unequal opportunity are removed and the effects of those conditions eliminated, *Green*, 391 U.S. at 437-38, "so that parents, students and the public have assurance against further injuries or stigma...." *Freeman*, 112 S. Ct. at 1449; *see also United States v. Fordice*, 112 S. Ct. 2727, 2743 (1992) (O'Connor, J., concurring) (emphasizing "the lost educational and career opportunities and stigmatic harms caused by discriminatory educational systems").[5]

At the same time, consistent with longstanding equitable principles, this Court has required that students affected by segregated and unequal schooling must be restored to the position they would have attained in the absence of the constitutional violation. *Milliken II*, 433 U.S. at 282, 290. Thus,

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[5] In suggesting that the courts should be concerned only with the generation of students who attended schools operating in their original condition of *de jure* segregation, the State misunderstands the remedial focus, which must concern whether the school system — as an institution that profoundly affects the development and life opportunities of children — has transformed itself. *See* Pet. Br. at 41. Moreover, the State is simply incorrect in contending that in this case, "any direct constitutional violation ended sometime between 18 and 40 years ago." Pet. Br. at 37. This contention ignores the findings in this case that the State had failed to undertake any steps to dismantle the dual system as of 1984 and 1985. J.A. 14, 46-50.

during the process by which a school district is transformed to eliminate its dual nature and all effects of *de jure* segregation, relief to restore students' lost educational opportunities and to address students' educational injuries is appropriate and necessary. *Id.* at 290.

The State's arguments would require the courts to treat as irrelevant evidence as to whether minority students continue to suffer educational harm. Such arguments simply ignore the fundamental holding of *Brown I* and "the principal wrong" addressed in this Court's subsequent desegregation jurisprudence. *Freeman*, 112 S. Ct. at 1443.

II. THE STANDARDS, PROCESS, AND SCOPE OF INQUIRY ESTABLISHED BY THIS COURT ARE ESSENTIAL TO THE CONSIDERATION OF WHETHER A SCHOOL DISTRICT HAS ATTAINED UNITARY STATUS.

A. This Court Has Established Clear Standards For the Consideration and Determination of Partial Unitary Status That Are Appropriately Directed at Determining Whether the Objectives of *Brown* Have Been Satisfied.

The Court's desegregation case law has always held that the ultimate goal of a remedial decree is to disestablish the dual school system and its vestiges, to cure the harmful effects of segregation and make the victims whole, and to prevent the re-emergence of a segregated school system. *See, e.g. Green*, 391 U.S. at 437-38 & n.4 (school district must "take whatever steps might be necessary to convert to a unitary school system in which racial discrimination would be eliminated root and branch" and which will "bar like discrimination in the future"); *Milliken II*, 433 U.S.

at 282 (approving make-whole educational relief designed to "restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education"); *Dowell*, 498 U.S. at 247 (a remedial decree would not be terminated until the purposes of the decree "had been fully achieved").

Consistent with these principles, the Court has in a long line of cases identified factors important in determining whether the goals of the remedial decree are being fully achieved. In *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*), the Court emphasized that school authorities must demonstrate "full" compliance with a remedial order. The Court also has consistently held that compliance with the decree must be actually effective in eliminating the vestiges of past discrimination. *See, e.g., Green*, 391 U.S. at 437-38; *Dowell*, 498 U.S. at 250. Similarly, the Court has noted that the interdependence of the remedies ordered must be considered. *See, e.g., Rogers v. Paul*, 382 U.S. 198, 200 (1965) (holding that students can challenge discriminatory faculty assignments because such assignments can "render[] inadequate an otherwise constitutional pupil desegregation plan").[6]

In addition, demonstration of a good faith commitment to desegregation has long been an important requirement of school authorities under a duty to dismantle a dual school system, as this helps ensure that discrimination will not re-emerge. *See, e.g., Brown II*, 349 U.S. at 300 ("good faith compliance" with the court's decree required); *Green*, 391 U.S. at 438 n.4 (decree

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[6] As noted in *Freeman*, the Court has "long recognized that the *Green* factors may be related or interdependent. Two or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well." 112 S. Ct. at 1449.

should effectively "bar like discrimination in the future"); *cf. Penick*, 443 U.S. at 661 (liability finding predicated in part on lack of good faith affirmative commitment to dismantling dual system).[7]

In *Freeman*, the Court synthesized this long line of cases, articulating the standards for determining when a district court could completely or partially terminate a remedial decree. The Court held that, in order to be declared to have achieved partial or complete unitary status, the defendants had to demonstrate that: (i) "there has been full and satisfactory compliance with the decree;" (ii) "the vestiges of past discrimination had been eliminated to the extent practicable;" (iii) "retention of judicial control is [not] necessary or practicable to achieve compliance with the decree in other facets of the school system;" and (iv) "the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Freeman*, 112 S. Ct. at 1446.

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[7] *Freeman* quoted with approval from the First Circuit's decision in *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987), which emphasized the importance of a showing of good faith: "[a] finding of good faith ... reduces the possibility that a school system's compliance with court orders is but a temporary constitutional ritual." *Id.* at 321. In a subsequent decision in *Morgan*, the First Circuit stressed that the evaluation of the effectiveness of a remedy must take into account whether it will maintain a desegregated system in the future: "[i]f there were not some discretion lodged in a desegregation court to attempt in a modest and limited way to assure that the attainment of long sought for goals was not illusory and ephemeral, the entire exercise, into which so many had invested so much, could well prove to have been a painful charade." *Morgan v. Burke*, 926 F.2d 86, 91 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1664 (1992).

In this case, the State offered only limited and conclusory evidence, on at most two of the four *Freeman* requirements: whether the State had complied with the decree and whether the remedies in the case were intertwined. *See* J.A. 439-483. The Eighth Circuit correctly found that by failing to present evidence to allow the detailed inquiry contemplated by *Freeman*, the State had failed to carry its burden of establishing that the court should discontinue the educational programs. P.A. 19-20.

B. This Court Has Established a Process That Is Essential To Determining Whether the Standards for Partial Unitary Status Have Been Satisfied.

This Court's decisions regarding the determination of partial or complete unitary status have emphasized the process that must be followed by the parties and the lower courts. The Court's most recent desegregation decisions, in *Dowell*, *Freeman*, and *Fordice*, have turned on issues of process. Those decisions have addressed at least four aspects of the required process that are relevant here.

First, it is well established that a remedial order may not be terminated absent an unambiguous notice to the parties that termination of the remedial order is contemplated. In *Dowell*, the Court held that notwithstanding a finding by the district court that the school district was unitary, the remedial order had not been terminated because of ambiguity as to whether the district court had found that the vestiges of past discrimination had been eliminated. 498 U.S. at 249-50 & n. 2.[8]

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[8] Underscoring the importance of process to this determination, the Court quoted a lower court's statement that "unitary status" means that the school district "has eliminated the vestiges of its prior discrimination *and has been adjudicated as such through the proper judicial procedures*." 498 U.S. at 245

Second, the process must include an evidentiary hearing in the district court. In *Freeman*, the Court emphasized that the "[p]roper resolution of any desegregation case turns on a careful assessment of its facts." 112 S. Ct. at 1437. In *Fordice*, the Court found error in the district court's failure to "make clear whether it had directed the parties to develop evidence...." 112 S. Ct. at 2741.

Third, the party seeking to terminate the remedial order must bear the burden of proof with regard to each of the standards. The Court's opinion in *Freeman* reiterated that, like all defendants seeking termination of an equitable remedy, those found guilty of *de jure* segregation bear the burden of demonstrating that the objectives of the remedy have been achieved, and "that any current imbalance is not traceable, in a proximate way, to the prior violation." *Id.* at 1447; *see also Fordice*, 112 S. Ct. at 2741 (*Brown* and its progeny "established that the burden of proof falls on the *State*, and not the aggrieved plaintiffs, to establish that it has dismantled its prior *de jure* segregated system").[9]

Fourth, the district court must state its conclusions and make specific findings of facts. In *Dowell*, the Court held that "[i]f [a

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(quoting *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1413 n. 12 (11th Cir. 1985)) (emphasis added).

[9] This burden is not unique to desegregation cases. It is the product of the longstanding equitable principle that before an injunction is to be dissolved, the party who has been adjudged a violator must satisfy the court that the purposes of the injunction have been fully served. *See United States v. Swift & Co.*, 286 U.S. 106, 119 (1932); *Ruiz v. Lynaugh*, 811 F.2d 856, 861 (5th Cir. 1987); *New York State Ass'n for Retarded Children, Inc. v. Carey*, 706 F.2d 956, 969-70 (2d Cir.), *cert. denied*, 464 U.S. 915 (1983); *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803, 813 (8th Cir.) (Blackmun, J.), *cert. denied*, 395 U.S. 905 (1969).

desegregation] decree is to be terminated or dissolved, [plaintiffs] as well as the school board are entitled" to a precise statement of the basis for the decision. 498 U.S. at 246. *Freeman*, likewise, explicitly required "specific findings and conclusions" from the district court on the standards for unitary status. 112 S. Ct. at 1430. The Court's opinion in *Fordice* found, among the errors in the process below, that the district court had failed to "make clear ... what th[e] evidence revealed." 112 S. Ct. at 2741.

For this Court to take up the State's attack on the educational remedy in this case at this procedural stage would do violence to the process in each of these respects. First, the State challenges a ruling of the district court not on a motion for unitary status, but on approval of a funding level for certain educational programs. *See* P.A. 10, 69-74. The State's contentions in the district court regarding these educational programs appear even more ambiguous with respect to the standards for unitary status[10] than was the order in *Dowell* that this Court rejected on process grounds.

Second, there was no full evidentiary hearing addressing each of the standards for unitary status, but only a single witness who gave testimony (discounted by the district court as conclusory) regarding the District's educational programs. *See* J.A. 439-483; P.A. 18.

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[10] In a subsequent order dated July 30, 1993, in which the State again sought partial unitary status for the educational programs, the district court made clear that it found the State's contentions regarding the quality of the District's educational programs fatally inconsistent — veering from the position that the programs were hopelessly ineffective to the position that the programs went further than the violation required. P.A. 112-13.

Third, the State made no factual showing that could have carried its burden of proof on the standards for unitary status. *Id.*; P.A. 19.

Fourth, the district court's findings and conclusions addressed the issue that was before it — approval of a plan, and funding, for educational programs — not the standards for determining whether the District had achieved partial unitary status. P.A. 10, 19, 69-74.

In these four respects, the State failed to comply with the process through which the issue of partial unitary status must be presented to the district court. As a result, there is no occasion for this Court even to order a remand on that issue. The state must comply with its evidentiary burdens so that, as discussed below, the district court in the first instance can conduct a broad inquiry of all the facts and circumstances in order to render an informed decision.

C. In Applying the Standards for Partial Unitary Status, the District Court's Inquiry is Broad, in Accord With Traditional Principles Governing the Exercise of Equitable Discretion.

The Court has consistently recognized that district court judges must consider a broad range of factors when exercising equitable discretion to formulate and supervise a court-ordered remedy. The Court in *Brown II* acknowledged that "because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal." *Brown II*, 349 U.S. at 299. The district court, in fact, must play the primary role in the process — a role that the appellate courts cannot properly

supplant.[11] Thus, in *Green*, the Court directed the district courts to weigh proposed remedies "in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness." *Id.* at 439. "Once invoked, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility is inherent in equitable remedies." *Milliken II*, 433 U.S. at 281 (*quoting Swann*, 402 U.S. at 15).

With respect to a unitary status determination, a district court's exercise of equitable discretion must likewise be informed by an examination of "every facet of school operations" when "considering whether the vestiges of *de jure* segregation ha[ve] been eliminated." *Dowell*, 498 U.S. at 250 (*quoting Green*, 391 U.S. at 435). *Freeman* reaffirmed that "both when a remedy is ordered and in the later phases of desegregation when the question is whether the courts' remedial control ought to be modified, lessened, or withdrawn," the court must examine the school system "in all its facets." *Freeman*, 112 S. Ct. at 1443-44. Most recently, in *United States v. Fordice*, 112 S. Ct. 2727 (1992), the Court observed that "we have consistently ... examined a wide range of factors to determine whether the State has perpetuated its formerly *de jure* segregation in any facet of its institutional system." *Id.* at 2735.

Thus, in contending that a district court is precluded from considering anything beyond the "*Green* factors," Pet. Br. at 20, 28-29, the State fundamentally misunderstands the nature of the district court's equitable discretion in making a unitary status determination. There is no simple formula for determining

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[11] *See Dowell*, 498 U.S. at 249-51 (remanding for district court determinations); *Freeman*, 112 S. Ct. at 1450 (same); *Fordice*, 112 S. Ct. at 2743 (same).

whether the vestiges of segregation have been eliminated. "[T]he *Green* factors need not be a rigid framework." 112 S. Ct. at 1146-47. The *Freeman* court specifically affirmed the district court's consideration of factors in addition to those set out in *Green*: "It was an appropriate exercise of its discretion for the District Court to address the elements of a unitary system discussed in *Green*, to inquire whether other elements ought to be identified, and to determine whether minority students were being disadvantaged in ways that required the formulation of new and further remedies...." *Id.* at 1446.[12]

The State's focus on only one factor — that did not even figure in the district court's decision and purportedly "first surfaced" as a part of the court of appeal's decision — is fundamentally at odds with the process described above. The State's position would constrict the evidence that the lower courts could consider, which would be a remarkable change in this Court's long line of desegregation case law. Moreover, by asking this Court to act upon a legal standard never adopted or even considered by the district court, the State would have this Court supplant the primary role of the district courts in this area.

III. EVIDENCE OF EDUCATIONAL OUTCOMES CAN BE RELEVANT AND HIGHLY SIGNIFICANT IN DETERMINING WHETHER UNITARY STATUS HAS BEEN ACHIEVED.

The State's petition and brief raise the question whether the lower courts erred in considering evidence of educational outcomes as part of the inquiry into unitary status. Such evidence

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[12] Justice Souter's concurrence similarly emphasized that "*Green's* list of specific factors, of course, need not be treated as exclusive," 112 S. Ct. at 1454 n.1 (Souter, J., concurring).

can be quite important for a district court in its evaluation of a school district "in all of its facets." *Freeman*, 112 S. Ct. at 1443.

A. This Court Has Consistently Held That a Searching Inquiry of Facts Regarding All Facets of a School System Is Required To Determine Appropriate Remedies and Their Effectiveness.

From the outset of its desegregation cases, this Court has required district courts to consider *all* available evidence of minority students' educational opportunities in deciding whether they are being deprived of equal protection under the laws. The Court in *Brown I* observed that it had rejected the imposition of any limitation on the facts that could be considered in deciding whether educational harm had resulted from segregation:

> In *Sweatt v. Painter* [339 U.S. 629 (1950)], in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In *McLaurin v. Oklahoma State Regents* [339 U.S. 637 (1950)], the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: '... his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.'

347 U.S. at 493. By considering all of these factors, the Court indicated that *all* evidence of the quality of education should be considered in deciding whether the students' constitutional right to equal protection of the laws was being violated.

This Court's more recent cases addressing unitary status determinations have similarly stressed the need to consider a broad range of evidence which bears on a school district's progress in eliminating the vestiges of segregation. *See Freeman*, 112 S. Ct. at 1437 ("[p]roper resolution of any desegregation case turns on a careful assessment of its facts"); *id.* at 1443-44 (district court should examine the school district "in all of its facets"); *Dowell*, 498 U.S. at at 250 (court should examine "every facet of school operations" when "considering whether the vestiges of *de jure* segregation ha[ve] been eliminated" (quoting *Green v. County School Board*, 391 U.S. 430, 435 (1968)).

B. District Courts Should Not Be Required To Ignore Relevant Evidence of the Effectiveness of a School District's Efforts to Desegregate.

Were this Court to adopt the position that district courts may not rely on evidence of educational "outcomes" in the course of determining whether unitary status had been achieved, district judges, faced with a difficult and fact-specific unitary status inquiry, would be deprived of highly relevant evidence. As this Court has stated, "the measure of a desegregation plan is its effectiveness." *Davis v. School Comm'rs*, 402 U.S. 33, 37 (1971). Evidence which bears on the effectiveness of the school district's desegregation efforts can be some of the most significant evidence available to a district court exercising its equitable discretion. A district court should not be precluded from considering such evidence in making a unitary status determination.[13]

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[13] In its reply in support of the petition for certiorari, the State proposed a *per-se* rule that evidence of educational outcomes is necessarily irrelevant to a unitary status determination. *See* Pet. Cert. Reply at 3 ("the lower courts were simply wrong in ***permitting consideration***" of educational outcome measures as relevant evidence) (emphasis added); *see also* Pet. Cert. Reply Br. at 6 n.5 ("[b]ecause the Fourteenth Amendment requires only the provision of equal opportunities, ***any*** reliance on test scores is improper") (emphasis in original). In its brief on the merits, the State may have intended to retreat from this extreme argument, but it persists in its challenge to the lower courts' use of educational achievement evidence. *See, e.g.*, Pet. Br. at 45-49.

There are numerous contexts in which "outcome" measures may be relevant to a unitary status determination. The lower courts, following this Court's mandate to examine "every facet of school operations," *Dowell*, 498 U.S. at 250, have considered evidence of the "outcomes" of many different aspects of a district's experience under an order to desegregate, including the following:

- *Academic achievement*: Courts have analyzed evidence of academic achievement of minority and majority students in a desegregating district. *See, e.g., United States v. City of Yonkers*, 833 F. Supp. 214 (S.D.N.Y.1993); *Pennsylvania Human Relations Comm'n v. School Dist.*, 638 A.2d 304, 321-23 (Pa. Commonw. 1994).

- *Discipline*: Courts have considered evidence that minority students in a district under a court-ordered duty to desegregate were subjected to disciplinary measures more frequently than their white peers. *See, e.g., Lee v. Etowah Co. Bd. of Educ.*, 963 F.2d 1416, 1426 (11th Cir. 1992) (relying on "evidence that black students within the system were more likely to be suspended from school than were white students within the system"); *Quarles v. Oxford Mun. Separate School Dist.*, 868 F.2d 750, 755-56 (5th Cir. 1989) (district court finding that "race plays no part in administering discipline in the Oxford School System" was not clearly erroneous).

- *Retentions and Drop-outs*: Courts have addressed evidence that minority students in a desegregating district dropped out of school at greater rates than white students. *See, e.g., United States v. City of Yonkers*, 833 F. Supp. 214, 223 (S.D.N.Y. 1993) (evaluating evidence of "disproportionate ... retentions and drop-outs").

Such evidence can shed light on each of the "factors which must inform the sound discretion of the court" in making a unitary status determination. *Freeman*, 112 S. Ct. at 1446. Evidence of the actual effects of a school district's efforts to desegregate clearly bears on whether the district has "complied in good faith with the desegregation decree since it was entered," *Dowell*, 498 U.S. at 249; whether the "vestiges of past discrimination have been eliminated to the extent practicable;" and "whether minority students [are] being disadvantaged in ways that require[] the formulation of new and further remedies." *Freeman*, 112 S. Ct. at 1446. Indeed, such evidence can help the court determine whether a district has grudgingly "dragged its feet" in response to court orders, or has instead demonstrated the required "good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Freeman*, 112 S. Ct. at 1446.

Evidence which bears on the effectiveness of the remedy can be particularly important in assessing whether a district has complied in good faith with quality-of-education components of a court order under *Milliken II*. Such "educational components" of a remedy are designed to "restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education," and can include "programs to remedy deficiencies, particularly in reading and communication skills" caused by

unconstitutional conditions. 433 U.S. at 281-82. The Court in *Milliken II* recognized that the purpose of programmatic relief such as was ordered in this case is to increase the achievement levels of minority students. The Court quoted the appeals court finding that "'[w]ithout the reading and counseling components, black students might be deprived of the motivation and *achievement levels* which the desegregation remedy is designed to accomplish.'" *Id.* at 278 (emphasis added) (quoting *Bradley v. Milliken*, 540 F.2d 229, 241 (6th Cir. 1976)). A district court evaluating whether a *Milliken II* remedy has accomplished its remedial purpose must therefore consider evidence indicating whether the programs have actually "remed[ied] deficiencies" suffered by victims of segregation. *Id.*

The State erroneously maintains that "the many external factors that affect achievement" somehow render outcome evidence irrelevant to a unitary status inquiry. Pet. Br. at 41. Contrary to the State's implication, this Court in *Freeman* reaffirmed the traditional role of district courts in considering, evaluating and weighing evidence, and the ability of district judges to evaluate evidence of test scores and other measures of educational achievement in an appropriate context. 112 S. Ct. at 1446–47.[14] Indeed, the district court in this case demonstrated a careful analysis of achievement test score data in a subsequent order, dated April 16, 1993. While finding that the data were generally relevant and reliable, the court downplayed the KCMSD's use of data on student achievement because it was not

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[14] *See United States v. City of Yonkers*, 833 F. Supp. 214, 221 (S.D.N.Y. 1993) (finding that vestiges of past segregation remained based in part on consideration of achievement measures); *Pennsylvania Human Relations Comm'n v. School Dist.*, 638 A.2d 304, 321-23 (Pa. Commonw. 1994) (denying motion for unitary status after examining "extensive testimony" including evidence of "achievement levels of students").

"probative to the extent which the District used it to make its sweeping conclusions as to academic success." P.A. 131. Thus, the district court's use of test score data cannot fairly be criticized as arbitrary or improper.

C. This Court Has Rejected Similar Attacks on the Consideration of Clearly Relevant Evidence.

Perhaps recognizing that it is not tenable to challenge the rulings below for merely considering data regarding educational achievement, the State asserts that the lower courts used standardized test scores as the *sole basis* for maintaining the remedial order in effect. But the courts below imposed no explicit or implicit "standardized test score" requirement for unitary status. In fact, the courts below treated evidence of student achievement as one of many factors relevant to determining whether the defendants had eliminated the vestiges of past segregation to the extent practicable.

The State's attack on a purported "test scores" requirement is simply a new version of a long-rejected argument. In earlier cases, defendants asserted that courts' reliance on student ethnicity data or faculty hiring goals was constitutionally impermissible. For example, in *Swann*, upon which the State relies, the defendant "urged that the District Court ha[d] imposed a racial balance requirement" on every school. 402 U.S. at 23. The Court read the district court's reliance on pupil assignment ratios not as inflexible "mathematical ratios" but as "a starting point in the process" of forming and evaluating a remedy. *Id.* at 25. The Court approved the use of such reference points because the "remedial decree is to be judged by its effectiveness," and reference to the racial composition of the school system provided a useful starting point "in shaping a remedy to correct past constitutional violations." *Id.* The Court thus affirmed the

district court's order as "within the equitable remedial discretion" of the district court. *Id.; see also Freeman,* 112 S. Ct. at 1437 ("a critical beginning point is the degree of racial imbalance" and "[t]his inquiry is fundamental").

The lower courts also have rejected arguments akin to the State's argument that — simply because numerical goals have been considered by the district court — an inflexible test has been imposed which must be met to achieve unitary status. *See e.g. Morgan v. Burke*, 926 F.2d at 90-91 (in denying partial unitary status with respect to faculty hiring, the court rejected the argument that hiring goals amounted to impermissible fixed ratio).

Similarly, in this case, the courts below did not create an inflexible mathematical standard, but rather considered student achievement data as one piece of relevant evidence. This was not error. As in *Swann*, this Court should distinguish between consideration of relevant and objective evidence, and imposition of an arbitrary quota. The courts below imposed no test score "quota" and their decisions should be affirmed.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Dated: December 6, 1994.

Respectfully submitted,

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FOR ARGUMENT

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In the

Supreme Court of the United States

October Term, 1994

STATE OF MISSOURI, et al.,
Petitioners,

v.

KALIMA JENKINS, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF AMICI CURIAE JAMES D. ANDERSON, ET AL., IN SUPPORT OF RESPONDENTS

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BRIEF OF AMICI CURIAE JAMES D. ANDERSON, ET AL., IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

Amici Curiae James D. Anderson, Lascelles F. Anderson, M. Beatriz Arias, James Blackwell, Jomills Henry Braddock, II, Everett Cataldo, Kenneth B. Clark, Robert L. Crain, Marvin Dawkins, Joyce L. Epstein, Reynolds Farley, Ricardo R. Fernandez, Gordon Foster, John Hope Franklin, Adam Gamoran, Carl A. Grant, Bruce R. Hare, Ian M. Harris, Larry Hedges, Jennifer L. Hochschild, Joseph Kahne, Kofi Lomotey, James M. McPartland, Mary Haywood Metz, Thomas K. Minter, Gary Natriello, George W. Noblit, Larry P. Nucci, Jeannie Oakes, John Ogbu, Gary A. Orfield, Thomas F.

Pettigrew, Mary Anne Raywid, James R. Rosenbaum, Juliet Saltman, Julian Samora, Robert Slavin, M. Brewster Smith, Mark A. Smylie, Margaret Beale Spencer, Alma F. Taeuber, Karl Taeuber, Marylee C. Taylor, William Trent, Henry T. Trueba, Oscar Uribe, Jr., William Velez, Meyer Weinberg, Amy Stuart Wells, Franklin D. Wilson, William Julius Wilson, J. Milton Yinger, John Yinger, and Constance M. Yowell[1] are social scientists who have studied extensively in the areas of education, economics, social policy, race relations, racial discrimination, and school desegregation. These amici include social scientists who have spent years, in many cases decades, identifying, researching, and studying the vestiges of segregation in schools throughout the United States and evaluating the remedial programs proposed and implemented to eliminate such vestiges.

This case involves important questions of how a district court should evaluate the success of a desegregation plan and at what point a school district should be deemed "unitary," thereby terminating the State's and school district's obligation to remedy the injuries resulting from more than a century of purposeful segregation.[2] Because of their unique perspective on the history of school segregation and experience in the study and evaluation of desegregation plans implemented to remedy the vestiges of such segregation, these amici respectfully submit this brief in support of respondents on the merits.[3]

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[1]The amici social scientists are more fully described at the end of the Appendix.

[2]*See, e.g., Adams v. United States*, 620 F.2d 1277, 1280 (8th Cir.), *cert. denied*, 449 U.S. 826 (1980).

[3]Pursuant to Rule 37 of the Rules of this Court, the parties have consented to the filing of this brief. Copies of the letters of consent from the parties have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

This brief addresses the limited issue of how district courts can measure whether vestiges of segregation in the area of educational quality have been eliminated to the extent practicable. The State argues that the district court can make the unitariness determination in this case by looking only at how much money the State has expended and the amount of time that has passed since a remedy was imposed. This superficial approach is divorced from reality. The passage of time and the amount of resources expended are relevant to this determination and may even bear some predictive relation to the success of a desegregation remedy. Any meaningful measurement of the effectiveness of a remedy for a constitutional violation requires, however, consideration of the degree to which the original injury has been ameliorated. Whether there are vestiges of segregation is a question of fact to be determined by the district court. This determination cannot be guided by some abstract touchstone such as that suggested by the State here. Social science provides tools for measuring whether vestiges of segregation remain. If a factual determination is made that some vestige of the constitutional injury remains, an appropriate remedy must also remain. Equal protection jurisprudence and logic require such an approach.

ARGUMENT

This Court has established clear standards for measuring whether a school district has become unitary, thereby allowing a federal court to withdraw its supervision. *Freeman v. Pitts*, 112 S. Ct. 1430 (1992); *Board of Education v. Dowell*, 498 U.S. 237, 111 S. Ct. 630 (1991). Unitariness is achieved when "'the vestiges of past discrimination [have] been eliminated to the extent practicable.'" *Freeman*, 112 S. Ct. at 1446 (quoting *Dowell*, 498 U.S. at 250). In making such a determination, a court should, among other factors, consider: whether the court

decree has been fully complied with; if partial unitariness is at issue, whether continued judicial control is necessary to achieve compliance in other aspects of the school system; and, most importantly, whether there has been a demonstration of a "good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Freeman*, 112 S. Ct. at 1446.

In the case at hand, as in every case of this type, there must be fact finding regarding unitariness, and it must be performed at the district court level. "Proper resolution of any desegregation case turns on a careful assessment of its facts." *Id.* at 1437 (citing *Green v. School Board*, 391 U.S. 430, 439, 88 S. Ct. 1689 (1968)). Relinquishment of judicial control is only appropriate "where justified by the facts of the case." *Id.* at 1445. The burden of coming forward with facts sufficient to show unitariness is on the defendant. *Id.* at 1447; *United States v. Fordice*, 112 S. Ct. 2727, 2743 (1992) (O'Connor, J., concurring) (it is the defendant's "burden to prove it has undone its prior segregation").

The suggestion that a flat amount of time or money can satisfy the State's obligation must be rejected. "There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance." *Green*, 391 U.S. at 439. This Court's consistent approach to desegregation remedies has emphasized the importance of shaping a remedy to address specific constitutional injuries. *See, e.g., Milliken v. Bradley* (*"Milliken II"*), 433 U.S. 267, 279-80, 97 S. Ct. 2749 (1977); *Swann v. Board of Education*, 402 U.S. 1, 15, 91 S. Ct. 1267 (1971); *Brown v. Board of Education*, 349 U.S. 294, 300, 75 S. Ct. 757 (1955) (citing *Hecht Co. v. Bowles*, 321 U.S. 321, 329-30, 64 S. Ct. 587 (1944)).

The State has claimed unitary status with respect to a portion of the Kansas City desegregation plan known by the parties as the *"Milliken II* programs." Petitioners' Appendix at A-4, A-11. To support the claim of unitariness, the State asserts that it has followed court orders since the desegregation decree was entered in 1985 and has made significant financial expenditures, but the State has come forward with no evidence that it has eliminated the vestiges of segregation to the extent practicable. *See Id.*; Petitioners' Brief at 2. The State's perspective appears to be that the expenditure of money is both the beginning and ending point in assessing the efficacy of desegregation remedies. The State's extensive focus on the costs of the programs in place in Kansas City presents a vision of remedies measured, and terminated, by mere expense. This is an inherently flawed and incomplete model of appropriate remedies for constitutional injuries. "The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about." *Green*, 391 U.S. at 436. The suggestion that inputs and expense are the only measures of success of a desegregation program runs counter to logic as well as the requirements of *Freeman* and *Dowell*. Most importantly, it does not address the constitutional injury itself.

Milliken II programs, such as those at issue in this case, are intended to counter the educational impairments caused by segregation and to prepare students and faculty for a desegregated environment. *Milliken II*, 433 U.S. at 283. The success of such educational programs in countering educational impairments and preparing the way for a desegregated environment can be measured. Appendix at A-6-22. Extensive research has been conducted by social scientists and others regarding the assessment of such educational programs. *Id.* Any assessment of the efficacy of the remedies should include an evaluation of a variety of indicators, including student resources, school resources, school processes, student opportunities to learn, and student outcomes. *Id.* at A-22-28.

These indicators, which focus on educational inputs, processes, and outcomes, are standard indicators used in educational policy and desegregation policy analysis.[4] *Id.* at A-26-27.

The determination of whether the vestiges of segregation have been eliminated to the extent practicable should be made recognizing that there may be other unrelated factors that can affect the efficacy of *Milliken II* programs. This recognition can be made without unduly burdening the technical possibility or economic feasibility of the assessment. *Id.* at A-26-28. To a large degree, the effects of unrelated factors can be disentangled by employing standard social science techniques and evaluation methods, thereby allowing a determination of what vestiges of segregation remain. *Id.* The fact that such an analysis may be difficult and complex hardly justifies abandoning the inquiry entirely. Fact finding is often difficult and complex. But that very complexity only counsels care and attention, not abstract standards unrelated to the residual injuries burdening the school children of Kansas City.

Moreover, as this Court has recognized, the process of eliminating segregation and its injurious effects, "root and branch," may take many years. *Green*, 391 U.S. at 435-38; *Raney v. Board of Education*, 391 U.S. 443, 88 S. Ct. 1697 (1968); *Swann*, 402 U.S. at 31-32. In another context involving similar educational impairments, this Court observed that "[r]eading and speech deficiencies cannot be eliminated by judicial fiat; they will require time, patience, and the skill of specially trained teachers." *Milliken II*, 433 U.S. at 290. Social

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[4]Measurement of these five types of indicators is standard practice in both the policy and the research community. Appendix at A-26. The National Center for Education Statistics, many states, and policy analysts and social scientists have devoted substantial time and attention to developing and refining systems of indicators. *Id.*

scientists have come to the same conclusion, finding that the elimination of the effects of segregation may take time. Appendix at A-28-31. The long-term effects of segregation can be remedied only by a long-term and good-faith commitment to desegregation and affirmative remedies. *Id.* at A-28-30. "[A]n integrated school system is no less desirable because it is difficult to achieve, and it is no less a constitutional imperative because that imperative has gone unmet for 38 years." *Freeman*, 112 S. Ct. at 1460 (Blackmun, J., concurring). The passage of time should make the imperative of eliminating the vestiges of segregation more, not less, urgent.

Now is not the time to sound the retreat from this Court's historic commitment to educational equality. "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation." *Swann*, 402 U.S. at 15. Unless and until the State of Missouri carries its burden of proof that this objective has been met, it cannot be relieved of its constitutional obligations.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

RESPECTFULLY SUBMITTED, this 6th day of December, 1994.

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APPENDIX:
EDUCATIONAL REMEDIES FOR SCHOOL SEGREGATION: A SOCIAL SCIENCE STATEMENT

December 2, 1994

In the 40 years since *Brown v. Board of Education*, through the steadfast insistence of this Court on equal protection of the laws, systems of government-sanctioned school segregation have slowly been dismantled. Substantial numbers of children across the United States have been given the opportunity to attend desegregated schools, and the effects upon them and their communities have been positive in many ways.[1] Still, while this nation has sought actively to end government-sanctioned segregation, it remains plagued by segregation's vestiges and by the continuing harms that those vestiges inflict on minority children and our communities. The vestiges of school segregation are the instruments and consequences of discriminatory racial separation that linger on after formal segregative activity has ceased.

Since *Brown*, a substantial research base has developed in the social sciences concerning the nature of school segregation and its vestiges and consequent harms. We have a better understanding about the systemic nature of school segregation and the processes of cumulative causation in social

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[1]W.D. Hawley & M.A. Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in P. Katz and D. Taylor (Eds.), ELIMINATING RACISM: PROFILES IN CONTROVERSY (New York: Plenum, 1988); A.S. Wells & R.L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, EDUCATIONAL EVALUATION AND POLICY ANALYSIS (in press). See also footnotes throughout this statement.

life.[2] School segregation, housing choice and segregation, and poverty concentrations in urban areas are mutually reinforcing.[3] Segregation and discrimination negatively affect identity, esteem, and motivation, and have deleterious consequences on academic achievement, educational and occupational attainment, and civic participation with respect to the disfavored class of students.[4] Segregation causes intergenerational harms—grandparents' and parents' weak education in segregated schools is passed along to their children

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[2]G. Myrdal, AN AMERICAN DILEMMA (New York: Harper, 1944); W.J. Wilson, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (Chicago: University of Chicago Press, 1987); C. Jencks & P.E. Peterson (Eds.), *op. cit.*

[3]D. Pearce, *Deciphering the Dynamics of Segregation: The Role of Schools in the Housing Choice Process*, THE URBAN REVIEW 13(2):85-101 (1981); W.J. Wilson, THE TRULY DISADVANTAGED (Chicago: University of Chicago Press, 1987); D.S. Massey & N.A. Denton, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (Cambridge, Mass.: Harvard University Press, 1993); C. Jencks & P.E. Peterson (Eds.), *op. cit.*

[4]G. Allport, THE NATURE OF PREJUDICE (Reading Mass.: Addison Wesley, 1954); D. Milner, CHILDREN AND RACE (Beverly Hills, Cal.: Sage, 1983); R.L. Crain & C.S. Weisman, DISCRIMINATION, PERSONALITY, AND ACHIEVEMENT (New York: Academic Press, 1972); J.H. Braddock & J.M. McPartland, MORE EVIDENCE ON THE SOCIAL-PSYCHOLOGICAL PROCESSES THAT PERPETUATE MINORITY SEGREGATION: THE RELATIONSHIP OF SCHOOL DESEGREGATION AND HOUSING DESEGREGATION (Report 338) (Baltimore: Johns Hopkins University, Center for the Social Organization of Schools, 1983); J.H. Braddock & J.M. McPartland, *Social Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation,* JOURNAL OF BLACK STUDIES 19(3):267-89 (1989); A.W. Wells & R.L. Crain, in press 1994, *op. cit.*

through lower income levels, lower occupational status, and reduced housing mobility.[5]

We now understand more fully that the vestiges of segregation are not only the consequence of particular discriminatory actions, but are also outcomes of beliefs and practices that remain embedded in custom and culture. The vestiges of segregation remain with families and communities that have experienced decades of segregation and are reflected in the institutions that serve them. In many communities, predominantly minority schools are considered less effective and lower status institutions than desegregated or predominantly white schools, which is particularly disturbing in light of the fact that over the past 25 years increasing numbers of minority children attend racially isolated schools.[6]

Research has shown that even today teachers in American schools hold lower expectations for the academic achievement of minority students than for that of white students. These lower expectations directly and negatively affect teachers' instructional practices, school-level curricular

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[5]R.W. Rumberger & J.D. Willms, *The Impact of Racial and Ethnic Segregation on the Achievement Gap in California High Schools,* EDUCATIONAL EVALUATION AND POLICY ANALYSIS 14(4):377-96 (1993).

[6]G. Orfield, DESEGREGATION OF BLACK AND HISPANIC STUDENTS FROM 1968 TO 1980 (Washington, D.C.: Joint Center for Political Studies, 1982); G. Orfield et al., STATUS OF SCHOOL DESEGREGATION 1968-1986: A REPORT OF THE COUNCIL OF URBAN BOARDS OF EDUCATION AND THE NATIONAL SCHOOL DESEGREGATION RESEARCH PROJECT (Chicago: University of Chicago, 1989).

and grouping policies, minority students' opportunities to learn, and, consequently, their academic achievements.[7]

These beliefs explain research findings that African American students who attend predominantly African American schools are much less likely than other students with identical job qualifications to be selected for employment.[8] Recent U.S. Department of Education data reveal that African American high school graduates are less likely to be employed than white high school dropouts.[9] Perhaps the most insidious and tragic aspect of these beliefs is that African Americans themselves may be vulnerable to the caricature. The negative perception of their academic ability may undermine the confidence that even the most exceptionally able African American students have that they can achieve at high levels.[10]

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[7]T.L. Good, *Two Decades of Research on Teacher Expectations: Findings and Future Directions,* JOURNAL OF TEACHER EDUCATION 38(4):32-47 (1987); L. Dusek (Ed.), TEACHER EXPECTANCIES (Hillsdale, N.J.: Erlbaum, 1985); R.C. Rist, THE URBAN SCHOOL: A FACTORY FOR FAILURE (Cambridge, Mass.: MIT Press, 1973); J. Oakes, A. Gamoran, R.N. Page, *Curriculum Differentiation: Opportunities, Outcomes, and Meanings,* in P.W. Jackson (Ed.), HANDBOOK OF RESEARCH ON CURRICULUM (New York: Macmillan, 1992).

[8]J.H. Braddock, R.L. Crain, J.M. McPartland, & R.L. Dawkins, *Applicant Race and Job Placement Decisions: A National Survey Experiment*, INTERNATIONAL JOURNAL OF SOCIOLOGY AND SOCIAL POLICY 6:3-24 (1986).

[9]National Center for Educational Statistics, THE CONDITION OF EDUCATION 1993 (Washington, D.C.: U.S. Department of Education, 1993).

[10]C. Steele, *Race and the Schooling of Black Americans*, THE ATLANTIC MONTHLY 269(4):68-78 (April 1992).

These results were, unfortunately, the logic of racial segregation. They reinforced the prejudices that caused them, providing a rationalization for continuing discrimination.[11] The vestiges of school segregation are that pervasive. Their effects constrain the capacity of minority citizens to fully exercise their individual and civil liberties.

The primary goal of remedial plans in previously segregated schools must be to restore the victims of segregation to the position that they would have occupied in the absence of discrimination. Government-sanctioned racial segregation and its vestiges have caused direct harm to the institutional quality of schools, the quality of education that students receive, and the academic and postschool outcomes of that education. To achieve an adequate remedy, schools must rid themselves of the institutional vestiges of forced racial separation so as to enhance the quality of educational opportunities available to students in those schools. Further, attention must be focused on the outcomes of educational opportunities for the victims of segregation. Attention to outcomes is essential for two reasons. First, outcomes constitute the best test of whether discriminatory acts and vestiges of segregation are remedied. Second, racial discrimination is an act against individuals. To restore individuals to the position they would have occupied in the absence of discrimination means to eradicate the educational deficits or problems that might have been caused by racial segregation and perpetuated by its vestiges.

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[11]G.D. Jaynes & R.M. Williams (Eds.), A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY (Washington, D.C.: Academy Press, 1989); L.H. Fuchs, THE AMERICAN KALEIDOSCOPE: RACE, ETHNICITY, AND THE CIVIC CULTURE (Hanover, N.H.: Wesleyan University Press, 1990); G. Allport, 1954, *op. cit.*

In addition to increased understanding about segregation and its vestiges and harms, social science has developed extensive knowledge concerning the remedial effectiveness of desegregation strategies and educational programs. This statement reports on social science findings on which there is substantial scholarly evidence.

The primary focus of this statement is on *Milliken II* educational remedies for school segregation. The statement is divided into three parts. Part I examines the potential remedial effectiveness of specific educational programs and policies. Part II discusses indicators and issues of measurement in assessing the effects of educational remedies. Part III, the conclusion, considers the relationship between educational programs and desegregation in fully addressing the vestiges and harms of school segregation.

I. SHAPING EFFECTIVE EDUCATIONAL REMEDIES

Almost all *Milliken II* plans contain some effort to achieve some measure of desegregation. However, an important goal of *Milliken II* plans is to remedy the vestiges harming students who continue to attend substantially racially isolated schools. Research and observation have shown that remedial educational programs that are successful in remedying the vestiges of segregation include: (1) increased educational resources; (2) innovative educational programs that target low-income racially isolated students; and (3) a focus on program implementation and changing the attitudes and behaviors of teachers, administrators, and other school personnel who work with students.

A. Increased Educational Resources

Some researchers have questioned whether there is a relationship between the amount of resources spent on

education and levels of student outcomes.[12] Their work has formed the basis of the counterintuitive notion that money does not matter in schools. Use of the most rigorous and valid analytical models, however, reveals much more positive effects of educational inputs than previously identified. By reanalyzing the same data used to support the conclusion that money matters little,[13] researchers using different methods have revealed a pattern of significant positive effects of higher per-pupil expenditure and teacher experience on student achievement.[14] Indeed, the most recent studies in education, economics, and related social sciences reveal even greater effects. These analyses provide additional evidence of significant positive relations between student achievement and higher per-pupil expenditure, teacher experience, teacher salary, and reduced class size, after controlling for student background.[15] The average size of these relationships is large

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[12]E.A. Hanushek, *Throwing Money at Schools,* JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 1:19-41 (1981); E.A. Hanushek, *The Impact of Differential Expenditures on School Performance,* EDUCATIONAL RESEARCHER 18(4):45-51, 62 (1989); E.A. Hanushek, *When School Finance "Reform" May Not Be a Good Policy,* HARVARD JOURNAL ON LEGISLATION 28:423-56 (1991).

[13]E.A. Hanushek, 1989, *op. cit.;* E.A. Hanushek, 1991, *op. cit.*

[14]L.V. Hedges, R.D. Laine, & R. Greenwald, *Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes,* EDUCATIONAL RESEARCHER 23(3):5-14 (1994); R. Greenwald, L.V. Hedges, & R.D. Laine, *When Reinventing the Wheel is Not Necessary: A Case Study in the Use of Meta-Analysis in Educational Finance,* JOURNAL OF EDUCATION FINANCE 20:1-20 (1994).

[15]R.D. Laine, F. Greenwald, & L.V. Hedges, *Does Money Matter: A Research Synthesis of the Relation Between Educational Resource Inputs and Student Outcomes,* in L.O. Picus (Ed.), 1995 YEARBOOK OF THE AMERICAN EDUCATIONAL FINANCE ASSOCIATION (Newbury

enough to be of policy significance. Increased resources can have a profound effect on low-achieving students.

B. Innovative Educational Programs

While increasing school resources generally can make a substantial contribution to remedying the vestiges and harms of segregation, it also matters how these resources are spent. During the past 15 years, a substantial amount of research has been conducted concerning educational programs that are particularly effective with low-achieving, racially isolated minority students. These types of programs have been part of numerous court-approved plans to remedy the vestiges and harms of segregation. Set forth below is a brief review of such programs, but the review is not comprehensive and a number of other types of programs and practices exist that may be effective. Much of this section is devoted to programs for children in the early grades because most research to date has been in these program areas. As discussed below, these types of programs are most effective accompanied by long-term follow-up programs in later grades. Effective programs must be developed across both elementary and secondary grade levels for these educational components to have their greatest impact.

There is a growing consensus among policymakers and educators that effective intervention in preschool, kindergarten, and early elementary grades results in significant positive

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Park, Cal.: Sage, in press). *See also* R. Ferguson, *New Evidence on How and Why Money Matters,* HARVARD JOURNAL ON LEGISLATION 28:465-98 (1991).

contributions to students' learning and development.[16] Academic success in the early grades is critically important to academic success throughout a student's school career and reduces the need for remedial and special education. While success in the early grades does not guarantee continued success, failure in the early grades is likely to lead to failure in later schooling. Indeed, economically disadvantaged third-graders who are significantly behind in reading or have been retained one grade level have approximately a one-in-four chance of ultimately graduating from high school.[17]

Research consistently supports the effectiveness of early childhood and preschool education programs, particularly for low-income, racially isolated minority children.[18] Early intensive intervention can keep these children from falling

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[16]R.E. Slavin, N.L. Karweit, & B.A. Wasik (Eds.), PREVENTING EARLY SCHOOL FAILURE: RESEARCH, POLICY, AND PRACTICE (Boston: Allyn & Bacon, 1994).

[17]D.N. Lloyd, *Prediction of School Failure from Third Grade Data,* EDUCATIONAL AND PSYCHOLOGICAL MEASUREMENT 38:1193-1200 (1978).

[18]B.A. Wasik & N.L. Karweit, *Off to a Good Start: Effects of Birth to Three Interventions on Early School Success,* in R.E. Slavin et al., 1994, *op. cit.;* G. Castro & K. White, *The Efficacy of Early Intervention Programs with Environmentally At-Risk Infants*, in M. Frank (Ed.), INFANT INTERVENTION PROGRAMS: TRUTHS AND UNTRUTHS (Binghampton, N.Y.: Harworth Press, 1985); D.C. Farran, *Effects of Intervention with Disadvantaged and Disabled Children: A Decade Review*, in S.J. Meisels & J.P. Shonkoff (Eds.), HANDBOOK OF EARLY CHILDHOOD INTERVENTION (New York: Cambridge University Press, 1990).

behind academically when they enter school.[19] Programs that provide services directly to the child (as opposed to parents only), are longer in duration, and begin before kindergarten appear to be the most effective.[20]

Early childhood and preschool programs alone, however, are not enough to alter the life chances of children born and reared in poverty and racial isolation.[21] While studies reveal robust effects from preschool participation after the end of one year of participation, such gains quickly diminish without follow-up support in later grades.[22] Research on Chapter 1

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[19]C.T. Ramey & F.A. Campbell, *Preventive Education for High-Risk Children: Cognitive Consequences of the Carolina Abecedarian Project,* AMERICAN JOURNAL OF MENTAL DEFICIENCY 88(5):515-23 (1984); C.T. Ramey, D.M. Bryant, & T.M. Suarez, *Preschool Compensatory Education and the Modifiability of Intelligence: A Critical Review,* in A. Ditterman (Ed.), CURRENT TOPICS IN HUMAN INTELLIGENCE (Norwood, H.J.: Ablex, 1985); H.L. Garer, THE MILWAUKEE PROJECT: PREVENTING MENTAL RETARDATION IN CHILDREN AT RISK (Washington, D.C.: American Education on Mental Retardation, 1988).

[20]C.T. Ramey et al., 1985, *op. cit.*; E.R. Jester & B.J. Guinagh, *The Gordon Parent Education Infant and Toddler Program*, in The Consortium for Longitudinal Studies, AS THE TWIG IS BENT . . . LASTING EFFECTS OF PRESCHOOL PROGRAMS (Hillsdale, N.J.: Erlbaum, 1983).

[21]J.S. Fuerst & D. Fuerst, CHICAGO EXPERIENCE WITH EARLY CHILDHOOD PROGRAMS: THE SPECIAL CASE OF THE CHILD PARENT CENTER PROGRAMS (Chicago: Loyola University, 1991); B.A. Wasik & N.L. Karweit, *Can Preschool Alone Prevent Early Failure?* in R.E. Slavin et al., 1994, *op. cit.*

[22]M. Deutsch, C.P. Deutsch, T.J. Jordan, & R. Gullo, *The IDS Program: An Experiment in Early and Sustained Enrichment,* in The Consortium for Longitudinal Studies, 1983, *op. cit.*; S.W. Gray, B.K.

programs suggests that remediation of learning deficits is best accomplished by programs that span over primary and secondary levels.[23] Beginning remedial programs in later grades is not as effective.

The most rigorous control group studies of the effects of kindergarten favor full-day over part-time attendance after controlling for initial student differences. These effects are most positive for educationally disadvantaged students.[24] However, like the findings for early childhood and preschool programs, there is little evidence of long-term effects of kindergarten attendance, even full-time attendance, without follow-up in the early elementary grades.[25]

Ramsey, & R.A. Klaus, *The Early Training Project (1962-1980),* in The Consortium for Longitudinal Studies, 1983, *op. cit.*; L.J. Schweinhart & D.P. Weikart, *The Effects of the Perry Preschool Program on Youths Through Age 15--A Summary,* in The Consortium for Longitudinal Studies, 1983, *op. cit.*; E.K. Beller, *The Philadelphia Study: The Impact of Preschool on Intellectual and Socioemotional Development,* in The Consortium for Longitudinal Studies, 1983, *op. cit.*

[23]U.S. Department of Education, REINVENTING CHAPTER I: THE CURRENT CHAPTER I PROGRAM AND NEW DIRECTIONS (Washington, D.C.: U.S. Department of Education, Office of Policy and Planning, 1993). M.M. Kennedy, B.F. Birman, & R. Demaline, THE EFFECTIVENESS OF CHAPTER I SERVICES (Washington, D.C.: U.S. Department of Education, 1986); R.E. Slavin et al., 1994, *ibid.*

[24]B.A. Wasik & N.L. Karweit, 1994, *op. cit.*

[25]I. Lazar & R. Darlington, *Lasting Effects of Early Education,* MONOGRAPHS OF THE SOCIETY FOR RESEARCH ON CHILD DEVELOPMENT 47 (2-3) (1982); R. McKey, L. Condelli, H. Ganson, B. Barrett, C. McConkey, M. Plantz, THE IMPACT OF HEAD START ON CHILDREN, FAMILIES, AND COMMUNITIES (Washington, D.C.: U.S. Department of Health and Human Services, 1985); B.A. Wasik & N.L. Karweit, 1994, *op. cit.*

One-to-one tutoring of low-achieving elementary grade students is one of the most effective instructional interventions available.[26] Virtually all tutoring program studies show positive effects, despite wide variations in program curriculum, tutoring methods, duration, and other characteristics. These effects extend beyond academic learning to reductions in grade retentions and special education referrals.[27] Programs that use certified teachers, as opposed to paraprofessionals, as tutors, that integrate with regular classroom instruction, and that are longer in duration tend to have the greatest and longest-lasting effects.[28]

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[26]B.A. Wasik & R.E. Slavin, *Preventing Early Reading Failure with One-To-One Tutoring,* in R.E. Slavin et al., 1994, *op. cit.*; R.E. Slavin, N.L. Karweit, & N.A. Madden (Eds.), EFFECTIVE PROGRAMS FOR STUDENTS AT RISK (Boston: Allyn & Bacon, 1989).

[27]R.E. Slavin, N.A. Madden, N.L. Dolan, & B.A. Wasik, SUCCESS FOR ALL: A RELENTLESS APPROACH TO PREVENTION AND EARLY INTERVENTION IN ELEMENTARY SCHOOLS (Arlington, Va.: Educational Research Service, 1992); E. McCleary, *Report of Results of Tutorial Reading Project,* THE READING TEACHER 24:556-59 (1971).

[28]D. DeFord, G.S. Pinnell, C. Lyons, & P. Young, READING RECOVERY: VOLUME IX, REPORT OF THE FOLLOW-UP STUDIES (Columbus, Ohio: The Ohio State University, 1988); R.E. Slavin et al., 1992, *op. cit.*; A.A. Silver & R.A. Hagin, PREVENTION OF LEARNING DISABILITIES (Department of Education, 1979); L.E. Arnold, N. Barnebey, J. McManus, D.J. Smeltzer, A. Conrad, & L. Desgranges, *Prevention of Specific Perception Remediation for Vulnerable First-Graders,* ARCHIVES OF GENERAL PSYCHIATRY 34:1279-94 (1977); D.G. Ellson, P. Harris, & L. Barber, *A Field Test of Programmed and Directed Tutoring,* READING RESEARCH QUARTERLY 3:307-67 (1968).

Research shows that academic achievement is generally enhanced in smaller classes.[29] Pupils with lower academic ability tend to benefit more from smaller classes than pupils of average ability. Smaller class sizes are particularly effective for economically and socially disadvantaged children.[30] Lower student/staff ratios are one of several important factors that positively affect achievement in compensatory education programs. The benefits of small class size extend beyond academic achievement to more positive student attitudes toward teachers and school, increased student motivation to learn, and higher student self-concept.[31] But, as we argue below, the effectiveness of reduced class size is dependent on instructional processes and opportunities to learn that are available to students within those classes.

Counseling and career guidance programs are potentially effective means to help address the vestiges and harms of segregation. Research reveals that counseling programs can

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[29]G.V. Glass & M.L. Smith, *Meta-Analysis of the Research on Class Size and Achievement,* EDUCATIONAL EVALUATION AND POLICY ANALYSIS 1:2-16 (1979); L.V. Hedges & W. Stock, *The Effect of Class Size: An Examination of Rival Hypotheses,* AMERICAN EDUCATIONAL RESEARCH JOURNAL 20:63-85 (1983).

[30]Educational Research Service, CLASS SIZE: A SUMMARY OF RESEARCH (Arlington, Va.: Educational Research Service, 1978); L.F. Carter, *The Sustaining Effect Study of Compensatory and Elementary Education,* EDUCATIONAL RESEARCHER 21:4-13 (1984); G.V. Glass, L.S. Cahen, M.L. Smith, & N.N. Filby, SCHOOL CLASS SIZE: RESEARCH AND POLICY (Beverly Hills, Cal.: Sage, 1982); J.D. Finn & C.M. Achilles, *Answers and Questions About Class Size: A Statewide Experiment,* AMERICAN EDUCATIONAL RESEARCH JOURNAL 27:557-77 (1990).

[31]G.V. Glass & M.L. Smith, 1979, *op. cit.*; H.M. Cooper, 1986, *op. cit.*; R.E. Slavin et al., 1989, *op. cit.*

help improve student academic achievement, social conduct, attendance, and drop-out rates.[32] Counseling has been shown to help improve student self-concept, motivation, sense of personal efficacy, attitude toward school, and interpersonal relations. In addition, career guidance programs have been found to increase the career awareness of students and the rates at which students explore nontraditional job opportunities. The programs have been found to be effective at both elementary and secondary grade levels and for minority and economically disadvantaged students.[33]

Research shows that portions of academic gains made during the regular school year may be lost over summer months and that this problem is potentially acute for economically disadvantaged students.[34] Poverty and racial isolation limit student exposure to educational resources outside of school and

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[32]E.L. Herr, *Research in Guidance*, in G. Walz & L. Benjamin (Eds.), NEW IMPERATIVES FOR GUIDANCE (Ann Arbor, Mich.: ERIC Counseling and Personnel Services Clearinghouse, 1978); E.L. Herr, *Pupil Personnel Staff: Discussion*, in H.J. Walberg (Ed.), IMPROVING EDUCATIONAL STANDARDS AND PRODUCTIVITY: THE RESEARCH BASIS FOR POLICY (Berkeley, Cal.: McCutchan, 1982); G.R. Walz, *Pupil Personnel Staff*, in H.J. Walberg, 1982, *ibid.*

[33]E.L. Herr, 1982, *ibid.*

[34]B. Heyns, SUMMER LEARNING AND THE EFFECTS OF SCHOOLING (New York: Academic Press, 1978); D.P. Hayes & J. Grether, THE SCHOOL YEAR AND VACATIONS: WHEN DO STUDENTS LEARN? (paper presented at the Eastern Sociological Association Convention, New York, 1969); D.P. Hayes and J.P. King, THE DEVELOPMENT OF READING ACHIEVEMENT DIFFERENTIALS DURING THE SCHOOL YEAR AND VACATIONS (Ithaca, N.Y.: Cornell University, 1974); R. Murnane, The Impact of School Resources on the Learning of Inner City Children (doctoral dissertation, Yale University, 1974).

increase the importance of schools in providing additional opportunities to students. Summer learning programs provide additional exposure to maintain and build upon the educational gains of students who may not otherwise have the opportunity to participate in academically oriented learning activities during the summer.[35] Summer school programs in early elementary grades have been found to help sustain the effects of early childhood education programs.[36]

Historically, cocurricular programs have been considered to be an important part of the total school curriculum. They take many forms, both athletic and nonathletic, and serve a variety of purposes.[37] Research has shown a positive relationship between participation in cocurricular programs and the development of a student's

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[35]B. Heyns, SUMMER PROGRAMS AND COMPENSATORY EDUCATION: THE FUTURE OF AN IDEA (paper presented at the Conference on Effects of Alternative Designs of Compensatory Education, Office of Educational Research and Improvement, U.S. Department of Education, Washington, D.C., 1986); D.P. Hayes & J. Grether, 1969, *op. cit.*; D.P. Hayes & J.P. King, 1974, *op. cit.*; R. Murnane, 1974, *op. cit.*

[36]H.L. Garber, THE MILWAUKEE PROJECT: PREVENTING MENTAL RETARDATION IN CHILDREN AT RISK (Washington, D.C.: American Association on Mental Retardation, 1988); B.A. Wasik & N.L. Karweit, 1994, *op. cit.*

[37]G. Graham, *Student Activities: An Overview and a Rationale*, NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS BULLETIN 48 (294):1-16 (1964); R.W. Frederick, THE THIRD CURRICULUM: STUDENT ACTIVITIES IN AMERICAN EDUCATION (New York: Appleton-Century-Crofts, 1959); A.C. Ornstein & D.U. Levine, AN INTRODUCTION TO THE FOUNDATIONS OF EDUCATION (3d ed.) (Boston: Houghton Mifflin, 1985); L.B. Otto, *Extracurricular Activities*, in H.J. Walberg (Ed.), 1982, *op. cit.*

educational aspirations, especially for low-achieving students.[38] Other research indicates that students who participate in these programs report a greater identification with their school, are more happy with their school experiences, and take more initiative in their work than students who do not participate in these programs.[39] Further, participation fosters greater opportunities for student contact and social development with teachers and other adults in nonclassroom settings. Research shows that students who participate in cocurricular activities report higher levels of self-concept and self-esteem than nonparticipating students.[40] Participation has been relatively positively to adult socializing patterns, greater social integration, and lower senses of self-estrangement and powerlessness as long as 15 years after high school graduation.[41] Participation has been found further to relate

[38]W.G. Sapdy, *Status Achievement, and Motivation in the American High School,* SCHOOL REVIEW 79:379-403 (1971); D.F. Alvin & D.L. Morgan, EXTRACURRICULAR ACTIVITIES: REVIEW AND DISCUSSION OF THE RESEARCH ON EDUCATIONAL PRACTICES (paper presented for the State of Georgia Department of Education, 1979); L.B. Otto, 1982, *op. cit.* E.E. Snyder & E. Spreitzer, *Participation in Sports as Related to Educational Expectations Among High School Girls*, SOCIOLOGY OF EDUCATION 50:47-55 (1977).

[39]M.L. Nover, STUDENT INVOLVEMENT AND THE PSYCHOLOGICAL EXPERIENCE OF THE HIGH SCHOOL (paper presented at the American Psychological Association Annual Meeting, Los Angeles, 1981).

[40]J.S. Yarworth & W.J. Gautheir, Jr., *Relationships of Student Self-Concept and Selected Personal Variables to Participation in School Activities,* JOURNAL OF EDUCATIONAL PSYCHOLOGY 70:335-44 (1978).

[41]L.B. Otto & D.L. Featherman, *Social, Structural, and Psychological Antecedents of Self-Estrangement and Powerlessness*,

positively to adult involvement in voluntary associations and to relate indirectly to adult political behavior.[42]

Finally, research finds that programs designed to involve parents directly in their children's education have significantly positive effects on student achievement.[43] General support of schooling by parents, through volunteer programs, Parent-Teacher Associations, and Adopt-A-School programs, among others, relates only weakly to a school's academic effectiveness. The most effective parent involvement takes the form of activities and attitudes that directly support student learning, including expressed interest in school work, participation in parent-teacher conferences, expressing high expectations for student academic success, and ensuring

AMERICAN SOCIOLOGICAL REVIEW 40:701-19 (1975); L.B. Otto, *Social Integration and the Status-Attainment Process*, JOURNAL OF SOCIOLOGY 81:1360-83 (1976).

[42]M.P. Hanks & B.K. Eckland, *Athletes and Social Participation in the Educational Attainment Process*, SOCIOLOGY OF EDUCATION 40:271-94 (1976); M.P. Hanks & B.K. Eckland, *Adult Voluntary Associations in Adolescent Socialization,* SOCIOLOGICAL QUARTERLY 19:481-90 (1978).

[43]W.D. Hawley, R.L. Crain, C.H. Rossell, M.A. Smylie, R.R. Fernandez, J.W. Schofield, R. Tompkins, W.T. Trent, & M.S. Zlotnik, STRATEGIES FOR EFFECTIVE DESEGREGATION: LESSONS FROM RESEARCH (Lexington, Mass.: Lexington Books, 1983); J. Crawford, *Instructional Activities Related to Achievement Gain in Chapter I Classes*, in R.E. Slavin et al., 1989, *op. cit.*; P. Griswold, K. Cotton, & J. Hansen, EFFECTIVE COMPENSATORY EDUCATION SOURCEBOOK, VOLUMES I AND II (Washington, D.C.: U.S. Department of Education, 1985); M.C. Wang, G.D. Haertel, & H.J. Walberg, *Toward a Knowledge Base for School Learning*, REVIEW OF EDUCATIONAL RESEARCH 63(3):249-94 (1993).

attendance and completion of homework.[44] Home reinforcement of classroom learning activities appears especially beneficial for low-income, racially isolated students.[45]

C. Implementation of Educational Programs

The adoption and funding of new programs and policies are not sufficient to ensure their effectiveness. The effectiveness of even the most promising programs and policies for low-achieving, racially isolated students depends significantly on implementation and upon changing the behaviors, attitudes, and practices of teachers and administrators in schools and classrooms.[46] Numerous scholars have noted the importance of the substance or content and instructional processes that function within the general structures of programs and policies.[47] Long-lasting and far-reaching change will need to address what goes on inside new structures. The real issue is the quality of the experience, as determined by the amount and quality of teacher-student academic and social interactions and the approaches and processes that teachers adopt in developing and implementing instructional activity. Indeed, there is a growing body of research that points to the particular effectiveness of early

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[44]M.C. Wang et al., 1993, *ibid.*

[45]W.D. Hawley et al., 1983, *op. cit.*

[46]M. Fullan, THE NEW MEANING OF EDUCATIONAL CHANGE (New York: Teachers College Press, 1991); W.D. Hawley et al., 1983, *op. cit.*; R.E. Slavin et al., 1989, *op. cit.*; R.E. Slavin et al., 1994, *op. cit.*

[47]M.C. Wang et al., 1993, *op. cit.*; R.E. Slavin et al., 1989, *op. cit.*; R.E. Slavin et al., 1994, *op. cit.*

emphasis on reading and language development and on direct instructional models and metacognitive instructional processes to promote the learning and development of low-achieving, racially isolated students.[48]

The research on change in educational organizations identifies four conditions that are crucial to the successful implementation of new programs and policies and change in school and classroom practice. The first condition is economic and political stability.[49] Change is more likely to occur when there are adequate and predictable levels of funding available for general educational expenditures and for new programs over a sustained period of time. It is also more likely to occur under conditions of long-term political and community support. Implementation and change are enhanced when local governments, community leaders, and state governments act as partners with schools and school districts rather than as adversaries. A crucial aspect of political and community support is patience and willingness to give adequate time for implementation of new programs and for effects of those new programs to occur.

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[48]B. Means & M.S. Knapp, TEACHING ADVANCED SKILLS TO EDUCATIONALLY DISADVANTAGED STUDENTS (Washington, D.C.: U.S. Department of Education, 1991); M.K. Stein, G. Leinhardt, & W. Bickel, *Instructional Issues for Teaching Students at Risk*, in R.E. Slavin et al., 1989, *op. cit.*; R.E. Slavin et al., 1994, *op. cit.*; M.C. Wang et al., 1993, *op. cit.*

[49]M. Fullan, 1991, *op. cit.*; W.D. Hawley et al., 1983, *op. cit.*; J. Feldman, E. Kirby, S.E. Eaton, & A. Morantz, STILL SEPARATE, STILL UNEQUAL: THE LIMITS OF MILLIKEN II'S EDUCATIONAL COMPENSATION REMEDIES (Cambridge, Mass.: Harvard Project on School Desegregation, 1994).

The second condition that influences implementation and the effectiveness of change is the adoption of systemic, comprehensive approaches to improvement. The research on educational change strongly supports the conclusion that little ventured is little or nothing gained.[50] Schools and school districts seem more successful in bringing about change the more change they attempt. Research also suggests that because of the organizational complexities of schools and school districts, and because of the tremendous powers of persistence that often control complex organizations, effective change must be approached systematically.[51] Problems must be addressed at different levels and in different places in the organization concurrently. Efforts to change one aspect of a school system (e.g., the classroom) must be accompanied by efforts to change other related aspects (e.g., the school, the district, and the state). Further, change must be approached comprehensively. That is, the greatest amount of change may be brought about through strategic, mutually reinforcing combinations of programs and policies, not through collections of independent programs. Indeed, some of the greatest documented academic successes for low-income, racially isolated minority students have occurred in schools that have combined research-based preschool programs, kindergarten programs, and early elementary programs in reading, writing, and language arts with one-to-one tutoring, parent involvement, and family support activities.[52]

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[50]M. Fullan, 1991, *op. cit.*

[51]M.S. Smith & J. O'Day, *Systemic School Reform*, POLITICS OF EDUCATION YEARBOOK 1990 (New York: Taylor & Francis, 1990).

[52]R.E. Slavin et al., 1992, *op. cit.*; N.A. Madden, R.E. Slavin, N.L. Karweit, L.J. Dolan, & B.A. Wasik, *Success for All: Longitudinal Effects*

The third crucial condition for implementation and change is the existence of comprehensive, ongoing programs of professional learning and development for teachers, administrators, and other school personnel.[53] New programs and policies frequently require the attainment of new knowledge and skills by teachers and other school personnel who are charged with their implementation. Effective professional development means more than one-day workshops, institute days, or beginning-of-the-year training sessions. It means extensive, ongoing study; in-class experimentation, feedback, and follow-up after initial training; and clinical supervision, peer or expert observation, and coaching. It also means developing new opportunities for collaborative planning, work, and problem solving among teachers and professional staff.[54] In the long run, a comprehensive program of professional development built around the implementation of programs and practices known to be effective with low-income,

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of a Restructuring Program for Inner-City Elementary Schools, AMERICAN EDUCATIONAL RESEARCH JOURNAL 30:123-48 (1993); J. Comer, *Educating Poor Minority Children*, SCIENTIFIC AMERICAN 259:42-48 (1988).

[53]S. Sarason, THE PREDICTABLE FAILURE OF EDUCATIONAL REFORM (San Francisco: Jossey-Bass, 1990); Fullan, 1991, *op. cit.*; W.D. Hawley et al., 1983, *op. cit.*; R.E. Slavin et al., 1989, *op. cit.*; M.W. McLaughlin & D.C. Marsh, *Staff Development and School Change*, TEACHERS COLLEGE RECORD 80(1):69-94 (1978).

[54]A. Lieberman & L. Miller, STAFF DEVELOPMENT FOR THE '90s (New York: Teachers College Press, 1993); B.R. Joyce, R.H. Hersh, & M. McKibbon, THE STRUCTURE OF SCHOOL IMPROVEMENT (New York: Longman, 1983).

racially isolated students may be the most cost-effective means of improving these students' achievement.[55]

The fourth condition consists of systems of monitoring and evaluation.[56] Successful implementation and change require accurate, relevant information about progress that can be used to identify and solve problems and assess goal attainment. Rigorous evaluation is essential to determine whether educational programs are working and to ensure accountability that additional resources are being used directly for remedying the vestiges and harms of segregation. There are various models of independent evaluation of remedial educational programs by local expert panels that prevent excessive court entanglement in the administration of remedial orders.

II. ASSESSING THE EFFECTIVENESS OF EDUCATIONAL REMEDIES

Policy analysts typically assess program effectiveness by focusing on resource inputs, processes, and outcomes.[57] The levels at which evaluation of educational programs take place are dependent upon technical and economical feasibility, as well as educational meaningfulness.[58] When analysts lack the

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[55]R.E. Slavin, *Statewide Finance Reform: Ensuring Educational Adequacy for High Poverty Schools*, EDUCATIONAL POLICY (in press).

[56]J. Feldman et al., 1994, *op. cit.*; Fullan, 1991, *op. cit.*; W.D. Hawley et al., 1983, *op. cit.*; Smith & O'Day, 1993, *op. cit.*

[57]A. Wildavsky, SPEAKING TRUTH TO POWER: THE ART AND CRAFT OF POLICY ANALYSIS (New Brunswick, N.J.: Transaction Publishers, 1987).

[58]G. Majone, EVIDENCE, ARGUMENT, AND PERSUASION IN THE POLICY PROCESS (New Haven, Conn.: Yale University Press, 1989).

technology and resources to systematically monitor a policy outcome, inputs and processes are all that can be assessed. To determine the extent to which educational remedies have addressed the harmful vestiges of segregation, policy analysts can and must examine outcomes as well.

Five types of indicators are relevant to assessing a school district's progress in remedying the harmful vestiges of segregation. These types of indicators are common in educational policy analysis generally and in desegregation research in particular. As explained below, reliable measures of these indicators presently exist. In addition, analytical techniques that are required to assess the relationships among resource inputs, changes in educational processes, and student outcomes attributable to those inputs and processes are readily available and represent standard practice in social science research and education policy analysis.

The first two types of indicators pertain to the resources that enter into the educational process. The first type—student resources—are those resources brought into the educational process by the students entering the system. These resources are reflected in the students' individual, family, and community characteristics. They provide a necessary context for analyzing the implementation and outcomes of the educational system and remedies. Relevant indicators of student resources for schooling process include health status, economic status, family site and structure, housing, minority status, parent education and occupational status, experience with crime, and racial isolation.

The second type of indicators pertain to school resources. These indicators represent basic aspects of the educational program. They include funding, academic and cocurricular programs, courses available to students, facilities, and instructional materials. They also include the number and quality of teachers and other professional staff, school and class

size, and the ratio of various kinds of professional staff (e.g., counselors, social workers, psychologists, resource teachers) to students.

School processes—the operating practices of schools—form the third type of indicators. Such processes include those related to the development and maintenance of the curriculum and to teachers' classroom practices and the delivery of instruction. They include school and classroom climate for instruction, the provision of special services, and the identification of student needs for such services. They also include processes relating to the continuing education and professional development of school staff and the governance and administration of the school and the school system.

Student opportunities to learn comprise the fourth type of indicators. These indicators call attention to the actual engagement of students with the school resources and processes that promote learning.[59] Schools may have resources appropriate to meet the needs of their students without necessarily delivering those resources to the appropriate students. For example, students must have access to the kind of instruction that prepares them for achievement tests if they are to maximize their performance on such tests. Failure to provide students these opportunities may be most likely to occur in schools serving large numbers of disadvantaged students. High concentrations of disadvantaged students may overwhelm the capacity of schools to match student needs with school

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[59]S.L. Traiman, THE DEBATE ON OPPORTUNITY TO LEARN STANDARDS (Washington, D.C.: National Governors Association, 1993); A. Porter, OPPORTUNITY TO LEARN, BRIEF NO. 7 (Washington, D.C.: Office of Educational Research and Improvement, U.S. Department of Education, 1990).

resources and create meaningful opportunities for students to learn.[60]

Student outcomes constitute the fifth type of indicators that must be examined to assess the remediation of harmful vestiges. The kinds of educational outcomes that should be examined in *Milliken II* remedies would include increased academic achievement as measured by higher standardized test scores. They also would include other outcomes such as lower dropout rates, higher graduation rates, career goals, positive racial attitudes, higher college-going rates, lower incidence of teenage childbirth, lower arrest and incarceration rates, greater educational attainment, and higher occupational status.

The contention is sometimes made that disadvantaged and minority students are not likely to show improvement on standardized test scores from increased resources. This contention is inaccurate. Numerous studies have shown changes in minority students' standardized test scores generally and in relation to specific interventions. For example, analyses of data from National Assessment of Educational Progress found that in the 1970s, African-American school children showed gains on standardized reading tests of approximately one standard deviation, closing one-third of the gap between their scores and those of white school children.[61] Evaluations of preschool, follow-through and elementary school reading programs have

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[60]C. Riehl, G. Natriello, & A.M. Pallas, LOSING TRACK: THE DYNAMICS OF STUDENT ASSIGNMENT PRACTICES IN HIGH SCHOOL (paper presented at the American Sociological Association Annual Meeting, Cincinnati, Oh., August 1992).

[61]N.W. Burton & L.V. Jones, *Recent Trends in Achievement Levels of Black and White Youth*, EDUCATIONAL RESEARCHER 11:10-17 (1982); L.V. Jones, *White-Black Achievement Differences: The Narrowing Gap*, AMERICAN PSYCHOLOGIST 539:1203-13 (1984).

employed different types of standardized measures and have found significant changes in minority student performance that were attributable to the interventions.[62] Carefully executed randomized experimental and quasi-experimental designs validate the findings of these studies.

Measurement of these five types of indicators is standard practice in both the policy community and the social science research community. The National Center for Education Statistics and many state governmental agencies have devoted significant time and attention to developing and refining systems of social and educational indicators. These systems often include many of the types of indicators noted in this statement. Indicators of student resources, including family and community characteristics, are captured by data from the U.S. Census, which data can now be reported for individual school districts. Many of the school resource, school process, and student outcome indicators have been measured reliably by student and teacher surveys. For example, the U.S. Department of Education has conducted national surveys of students and teachers that contain items focusing on student achievement, delinquency, and postgraduate outcomes.[63] Indicators of student opportunities to learn are entering the policy arena through the efforts of the National Governors' Association and the U.S.

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[62]The Consortium on Longitudinal Studies, 1983, *op. cit.*; J.A. Stallings, *Implementation and Child Effects of Teaching Practices in Follow Through Classrooms*, MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 40 (1975); R.E. Slavin et al., 1994, *op. cit.*

[63]National Center for Educational Statistics, THE NATIONAL EDUCATIONAL LONGITUDINAL SURVEY (Washington, D.C.: U.S. Department of Education, 1994); National Institute of Education, THE SAFE SCHOOL STUDY (Washington, D.C.: U.S. Department of Education, 1978).

Department of Education's National Center on Organization and Restructuring of Schools at the University of Wisconsin, among others. All the above-mentioned measures are in the public domain and are readily available for local adoption.

Measurement of all five types of indicators is increasingly becoming a routine, ongoing function of many state educational agencies. For example, the state of Missouri has developed a series of measures and standards for the Missouri School Improvement Program.[64] This series contains measures relating to school resources, including programs available to students, staffing ratios and class size, and staff certification and quality. It also contains measures relating to school processes, such as curriculum development practices, instructional practices, instructional climate, availability of special programs, guidance and support services, teacher professional development, and school governance and administration. Indicators of student performance and outcomes are also measured in the Missouri School Improvement Program. These measures include achievement on standardized tests, performance on college entrance exams (i.e., ACT, SAT), completion of vocational education programs, the percentage of students completing high school, the percentage of students completing a postsecondary program, and the percentage of students employed following graduation.

Analytical techniques are also readily available to assess accurately relationships among student and school resources, school processes and practices, student opportunities to learn, and student outcomes. While there are a large number of factors that may account for changes in these indicators, particularly

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[64]Missouri Education Information System, MISSOURI SCHOOL IMPROVEMENT PROGRAM STANDARDS AND INDICATORS (1994).

those indicators of student outcomes, a variety of procedures exist that can be used to identify the unique effects of programs and policies. Among the most standard social science research procedures that are used to "control" for the influence of extraneous factors are randomized experimental and quasi-experimental research designs and multivariate statistical techniques.[65] These designs and techniques are used routinely in social science and education research, including research on the outcomes of school desegregation, and are easily applied in assessing the effectiveness of *Milliken II* remedies.

It is important to consider *when* it is appropriate to assess a school district's progress in remedying the vestiges of segregation under a *Milliken II* plan. Educational research is consistent in its conclusion that bringing about meaningful, long-lasting change in schools and school districts takes significant amounts of time.[66] Complex educational inequalities require systemic change and cannot be redressed overnight. *Milliken II* educational plans are aimed at remedying the

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[65]B.J. Weiner, STATISTICAL PRINCIPLES IN EXPERIMENTAL DESIGN (New York: McGraw-Hill, 1971); D.T. Campbell & J.C. Stanley, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (Dallas: Houghton Mifflin, 1963); F.N. Kerlinger, FOUNDATIONS OF BEHAVIORAL RESEARCH (New York: Holt, Rinehart and Winston, 1973); F.N. Kerlinger & E.J. Pedhazur, MULTIPLE REGRESSION IN BEHAVIORAL RESEARCH (New York: Holt, Rinehart and Winston, 1973); A.S. Bryk & S.W. Raudenbush, HIERARCHICAL LINEAR MODELS: APPLICATION AND DATA ANALYSIS METHODS (Newbury Park, Cal.: Sage, 1992).

[66]M. Fullan, 1991, *op. cit.*; S. Sarason, THE CULTURE OF THE SCHOOL AND THE PROBLEM OF CHANGE (Boston: Allyn & Bacon, 1979); R.F. Elmore & M.W. McLaughlin, STEADY WORK: POLICY, PRACTICE, AND THE REFORM OF AMERICAN EDUCATION (Santa Monica, Cal.: Rand Corporation, 1988).

vestiges of historical systems of segregation and discrimination. It would be unreasonable to expect to find strong evidence of turning around a history of pervasive discrimination reaching across generations in only a few years, regardless of the amount of resources initially applied.

There are other reasons why it is difficult to assess the effectiveness of educational remedies in the short-term. Research on the long-term effects of school desegregation demonstrates that the most positive results of desegregation remedies may not become evident until program participants have become adults. The strongest impact of these programs may be the way in which they improve the life chances and the occupational status attainment of the victims of discrimination.[67] Based on what research has demonstrated about the ways in which desegregated school environments improve the aspirations, opportunities and accomplishments of minority students,[68] a remedy aimed at removing the vestiges of

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[67]A.S. Wells & R.L. Crain (in press), *op. cit.*

[68]J.H. Braddock, *The Perpetuation of Segregation Across Levels of Education: A Behavioral Assessment of the Contact-Hypothesis*, SOCIOLOGY OF EDUCATION 53:178-86 (1980); J.H. Braddock, SEGREGATED HIGH SCHOOL EXPERIENCES AND BLACK STUDENTS' COLLEGE AND MAJOR FIELD CHOICES (Paper presented at the National Conference on School Desegregation, University of Chicago, 1987); J.H. Braddock, R.L. Crain, J.M. McPartland, & R.L. Dawkins, *Applicant Race and Job Placement Decisions: A National Survey Experiment*, INTERNATIONAL JOURNAL OF SOCIOLOGY AND SOCIAL POLICY 6(1):3-24 (1986); J.H. Braddock & J.M. McPartland, *How minorities continue to be excluded from equal employment opportunities: Research on Labor Market and Institutional Barriers*, JOURNAL OF SOCIAL ISSUES 43(1):5-39 (1987); J.H. Braddock & J.M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, JOURNAL OF BLACK STUDIES 19(3):267-89 (1989).

a segregated system *without* desegregation is likely to be more difficult and time consuming. Since some of the factors that have proven effective in improving the life chances of minority students in desegregated settings—access to higher-status schools and the social networks associated with them—are not available to students who remain in segregated schools, the positive effects on these students would likely take much longer.

Another reason to be pessimistic about early indications of success of educational remedies is that not only are many of the most positive effects of desegregation long-term, but many are only clear for students experiencing desegregation beginning in the early years of schooling.[69] There is reason to expect that the most positive long-term effects of *Milliken II* remedies might also accrue to students who experience these remedies when they are very young. As indicated earlier, among the most potential potent educational programs for remedying the vestiges and harms of segregation are preschool, kindergarten, and early elementary school programs. However, the ultimate effectiveness of these programs depends upon continued special assistance in later years.[70]

It may be possible, however, to anticipate the achievement of long-term outcomes of educational remedies by examining intermediate indicators. For example, it may be possible to anticipate successful postschool outcomes by identifying positive student career aspirations, behavior, teen sexual activity, delinquency, grades, and dropout outcomes by

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[69]R.L. Crain & R.E. Mahard, *The Effects of Research Methodology on Desegregation Achievement Studies: A Meta-Analysis*, AMERICAN JOURNAL OF SOCIOLOGY 83(5):839-58 (1983).

[70]The Consortium on Longitudinal Studies, 1983, *op. cit.*

midway through high school. A successful *Milliken II* plan might show evidence of a trend toward closing of the gap between actual minority performance on standardized tests of achievement and performance that could be expected in the absence of a history of segregation.

III. CONCLUSION

The social science research indicates that there are a number of educational programs that can make a significant contribution to remedying the vestiges and harms of racial segregation. There is also substantial knowledge of the conditions that are necessary to promote implementation of new programs and changes in institutional and instructional practices. There also exist readily available indicators, measures, and analytical techniques to evaluate the extent to which these programs achieve their intended effects.

The educational remedies that hold the most potential for remedying vestiges and harms of segregation may be expensive and will certainly require long-term commitments of time and resources for their benefits to accrue. The challenges for making these programs work are indeed considerable. One of the most significant vestiges of school segregation is the high concentrations of economic poverty in urban school districts.[71] Research consistently shows that low-income children enrolled in schools with high concentrations of poor students are more likely to have lower achievement test scores than low-income

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[71]D.S. Massey & N.A. Denton, 1993, *op. cit.*; C. Jencks & P.E. Peterson, 1991, *op. cit.*; W.J. Wilson, 1987, *op. cit.*; D. Pearce, 1981, *op. cit.*

children enrolled in schools with fewer poor classmates.[72] When low-income African American students from urban schools are given the opportunity to attend predominantly white middle- and upper-middle income suburban schools, they are less likely to drop out of high school, get into trouble with the police, or have a baby before the age of 18 than low-income African American students who remain in racially isolated, low-income schools.[73] Thus, in addition to the educational challenges associated with racial segregation, *Milliken II* remedies must attend to the educational challenges associated with high poverty concentrations in schools.

The relationship between educational programs and other desegregation efforts to remedy the vestiges and harms of segregation is mutually reinforcing. The effectiveness of desegregation remedies of the 1980s was enhanced in large part by accompanying educational components. Likewise, educational components are more effective when paired with other desegregation remedies. A combination of well-designed, well-conceived, effective educational remedies and desegregation is the most promising way to restore the victims

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[72]U.S. Department of Education, 1993, *op. cit.*; M.M. Kennedy, B.F. Birman & R. Demaline, 1986, *op. cit.*; A.A. Summers & B.L. Wolfe, *Do Schools Make a Difference?* AMERICAN ECONOMIC REVIEW 67:639-52 (1977); V.E. Lee & A.S. Bryk, *A Multilevel Model of the Social Distribution of High School Achievement,* SOCIOLOGY OF EDUCATION 62:172-92 (1989); R.W. Rumberger & J.D. Willms, 1993, *op. cit.;* J.C. Coleman et al., EQUALITY OF EDUCATIONAL OPPORTUNITY (Washington, D.C.: U.S. Government Printing Office, 1966).

[73]R.L. Crain et al., A LONGITUDINAL STUDY OF A METROPOLITAN VOLUNTARY SCHOOL DESEGREGATION PLAN (New York: Columbia University, Teachers College, Institute for Urban and Minority Education, 1991); A.S. Wells & R.L. Crain (in press), *op. cit.*

of discriminatory conduct to the position they would have occupied in the absence of discrimination.[74]

It is crucial that the courts devote sufficient resources and allow sufficient time for remedial programs to be effectively implemented and to achieve their intended outcomes. At the same time, it is incumbent upon the courts to rigorously monitor and evaluate the use of additional resources and the effectiveness of remedial programs. As has been noted in this statement, there are indicators, measures, techniques, and processes that are readily available from social science that can be used to accomplish this task efficiently and to keep the courts from becoming too entangled in the daily operations of schools and school districts.

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[74]J. Feldman et al., 1994, *op. cit.*

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